NO. 83-6043



IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

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GREGORY SCOTT ENGLE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

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# PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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## QUESTIONS PRESENTED

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## CITATION TO OPINION BELOW

The opinion of the Supreme Court of Florida, Engle v. State, 438 So.2d 803 (Fla. 1983), is set forth in Appendix A. The motion for rehearing is set forth in Appendix B, and the denial thereof in Appendix C.

## JURISDICTION

Review is sought pursuant to 28 U.S.C. §1257(3). The judgment below was entered September 15, 1983, and petitioner's timely notice for rehearing was denied on November 4, 1983.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the constitutionality of a death sentence imposed pursuant to Section 921.141, Florida Statutes, which is set forth in Appendix D. This case involves the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution (Question I) and the Eighth and Fourteenth Amendments to the United States Constitution (Question II).

## STATEMENT OF THE CASE

Petitioner was found guilty, after a jury trial, of first degree murder. After the penalty phase of the trial, the jury returned a verdict recommending that petitioner be sentenced to life imprisonment without possibility of parole for twenty-five years. Notwithstanding the jury's recommendation, the trial court, on August 17, 1979, sentenced petitioner to death.

On September 15, 1983, the Supreme Court of Florida affirmed petitioner's conviction, approved the trial court's findings of four aggravating and no mitigating circumstances, and approved the court's override of the jury's life recommendation [App.A.10]. However, the Court concluded that the trial court improperly considered information derived from a co-defendant's [Stevens] confession, which was introduced at Stevens'

trial but not at petitioner's trial, in violation of petitioner's rights of confrontation and due process [App.A.11-12]. The Court remanded the case for re-sentencing, without the necessity of empaneling another jury [App.A.12]. Justice Alderman, joined by Justice Boyd, dissented as to the confrontation issue, and would have affirmed both the conviction and death sentence [App.A.12-13]. Petitioner's timely motion for rehearing was denied on November 4, 1983 [App.B and C].

## HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

In his brief on appeal, petitioner contended that the excusal for cause of prospective jurors Ruis and Young violated the principles set forth in Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968)[App.E.2-11, App.F.2-3]. Petitioner argued that this error not only required reversal of the death sentence imposed in this case, but also required reversal of his conviction for a new trial [App.E.11, App.F.2-3]. The Supreme Court of Florida rejected petitioner's arguments, and concluded that the trial court properly excused prospective jurors Ruis and Young [App.A.5-6]. In his motion for rehearing, petitioner argued that the Florida Supreme Court should reassess its conclusion that no Witherspoon violation occurred in light of the intervening case of Witt v. Wainwright, __F.2d__ (11th Cir. 1983)(Case No. 81-5750, opinion filed September 16, 1983)[App.B.3-6]. Petitioner further argued that, in light of the recent decision in Grigsby v. Mabry, __F.Supp.__ (E.D.Ark. 1983)(33 Cr.L. 2477) (opinion filed August 5, 1983), the "death-qualification" of the jury in this case requires reversal of his conviction for a new trial [App.B.6-11]. The Florida Supreme Court denied rehearing, without opinion, on November 4, 1983 [App.C].

In his appellate brief, petitioner also asserted that the provision of the Florida death penalty statute which permits the trial judge to override a jury recommendation of life imprisonment and to impose a death sentence in its stead is unconstitutional; specifically, that it violates the Fifth, Sixth,

Eighth, and Fourteenth Amendments to the United States Constitution [App.E.12-13]. Petitioner noted that the Florida Supreme Court has consistently rejected constitutional challenges to the life override procedure; notwithstanding this fact, petitioner raised the issue on principle and to preserve it for further review (App.E.12-13].

The Florida Supreme Court, referring only to the double jeopardy aspect of petitioner's constitutional argument, rejected it on the basis of its prior decision in Douglas v. State, 373 So.2d 895 (Fla. 1979)[App.A.10]. The Court's opinion does not reflect that petitioner's constitutional objections to the life override procedure were also based on due process and Eighth Amendment grounds [see App.E.12; App.A.10]; however, the Court did specifically reject these arguments in Porter v. State, 429 So.2d 293, 296-97 (Fla. 1983). [Petitioner, in his initial brief, called the Court's attention to the then-pending appeals in Porter; Phippen v. State, 389 So.2d 991 (Fla. 1980); and Johnson v. State, 393 So.2d 1069 (Fla. 1980), as cases in which the constitutional arguments against the life override were more extensively briefed[1] [App.E.12-13]. Subsequently, the Florida Supreme Court upheld the constitutionality of the life override provision in each of these cases.]

The Florida Supreme Court, in the instant case, also held that the trial court properly found four aggravating and no mitigating circumstances, and properly overrode the jury's recommendation of life [App.A.10]. In view of these holdings, petitioner believes that the constitutional issue is ripe for review notwithstanding the fact that the Court remanded the case for resentencing (without the necessity of empaneling a new jury) on other grounds.

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[1] Florida Rule of Appellate Procedure 9.210(a)(5) provides that an initial brief shall not exceed 50 pages, unless a longer brief is permitted by the Court. In practice, the Florida Supreme Court routinely accepts 60 page briefs in capital cases, but briefs which are longer than 60 pages are sometimes rejected, as in Teffeteller v. State, 439 So.2d 840 (Fla. 1983)(case no. 60,337) and Card v. State (pending, case no. 61,715). In the present case, petitioner's 69 page brief was accepted by the Court. In view of the page limitations, petitioner's express intention to preserve the issue for further review, and his adoption by reference of the arguments made in Porter, Phippen, and Johnson, petitioner submits that the issue of the constitutionality of the life override procedure was sufficiently raised below to preserve it for review by this Court.

## REASONS FOR GRANTING WRIT

### QUESTIONS PRESENTED

#### QUESTION I

THE FLORIDA SUPREME COURT'S APPROVAL OF THE PRACTICE OF "DEATH-QUALIFYING" PROSPECTIVE JURORS IN CAPITAL TRIALS, AND THE EXCUSAL FOR CAUSE OF TWO PROSPECTIVE JURORS IN THE INSTANT CASE ON THE BASIS OF THEIR EXPRESSED UNWILLINGNESS OR RELUCTANCE TO VOTE FOR IMPOSITION OF THE DEATH PENALTY, VIOLATED PETITIONER'S RIGHT TO AN IMPARTIAL JURY AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The Supreme Court of Florida, in its opinion in the instant case, quoted the following portions of the voir dire of prospective jurors Ruis and Young:

> Q. (prosecuting attorney): [C]ould you under any circumstances, regardless of the proof or how strong it is, vote to send the man to the electric chair?
>
> [Mr. Ruis]: I would not vote to send a man to the electric chair.
>
> * * *
>
> Q. (the court): Would you ever vote to impose the death penalty under any circumstances?
>
> [Mr. Ruis]: At this point, I would say no.
>
> Q. Would you refuse to consider imposition of the death penalty in the case we are now about to try, even if he is found guilty by the jury? Would you refuse to consider the death penalty?
>
> A. Yes.
>
> (App.A.5)(emphasis supplied)
>
> * * *
>
> Q. (the court): If he was convicted of murder in the first degree and the second phase of the proceeding in which the jury would listen to mitigating and aggravating circumstances, would you under those circumstances participate in a vote recommending the death penalty?
>
> [Miss Young]: I would not participate in recommending the death penalty.
>
> Q. By that, you mean you would not vote for the death penalty?
>
> A. I would not vote for the death penalty.

Q. Under no circumstances?

A. No.

Q. No matter what the circumstances were, you would not vote for the death penalty.

A. I don't think I would.

(App.A.5)(emphasis supplied)

The Court concluded that the above responses demonstrated that both of the excused jurors had "more than 'general objections to the death penalty'":

> Both admitted that they would refuse to vote for the death penalty regardless of the facts or the circumstances, and one who demonstrates an irrevocable commitment to so vote may properly be dismissed. The trial court did not violate the strictures of Witherspoon.
>
> (App.A.5-6)

Petitioner submits that the Florida Supreme Court's determination that the responses of prospective jurors Ruis and Young demonstrate an "irrevocable commitment" to vote against the death penalty is highly questionable in light of Witt v. Wainwright, __F.2d__ (11th Cir. 1983)(case no. 81-5750, opinion filed September 16, 1983), which recognizes that a prospective juror must be given great leeway in expressing opposition to the death penalty before he or she qualifies for dismissal for cause [see App.B.1-6]. However, petitioner's argument in this petition for writ of certiorari is based primarily on the recent decision of the United States District Court in Grigsby v. Mabry, __F.Supp.__ (E.D.Ark. 1983)(33 Cr.L. 2477)(opinion filed August 5, 1983), which holds that the exclusion of jurors who are opposed to the death penalty but who could be fair and impartial on the question of guilt or innocence [a category which would clearly include Mr. Ruis and Miss Young, even assuming arguendo that their commitment to vote against a death sentence was unequivocal] is violative of the Sixth Amendment, and requires reversal of conviction as well as sentence. The court in Grigsby discussed the "guilt-proneness" of death-qualified juries, and stated, inter alia:

> All of petitioners' experts testified as to the relationship between death penalty attitudes and other criminal

justice related attitudes. All agreed that the empirical evidence and data made it clear, in their professional opinions, that persons excluded by the process of death qualification share sets of attitudes toward the criminal justice system that set them apart and distinguish them collectively from those not excluded by that process. All were also of the opinion that death-qualified jurors are more prone to favor the prosecution, to be hostile to the defendant, to regard significant constitutional rights lightly, and to make adverse judgments concerning minority groups than persons who adamantly oppose the death penalty (i.e., are not "death qualified"). Petitioners' experts were convinced that death-qualified jurors differ systematically from those excluded under Witherspoon standards. ***

The Court credits and accepts the said opinions of petitioners' experts and finds that those opinions are based overall on solid scientific data, reason, and common sense.

* * *

To summarize, death qualification skews the predispositional balance of the jury pool by excluding prospective jurors who unequivocally express opposition to the death penalty. The evidence, and particularly the attitudinal surveys discussed by Drs. Bronson and Hastie, clearly establishes that a juror's attitude toward the death penalty is the most powerful known predictor of his overall predisposition in a capital criminal case. That evidence shows that persons who favor the death penalty are predisposed against the defendant. The evidence shows that death penalty attitudes are highly correlated with other criminal justice attitudes. Generally, those who favor the death penalty are more likely to trust prosecutors, distrust defense counsel, to believe the state's witnesses, and to disapprove of certain of the accepted rights of defendants in criminal cases. A jury so selected will not, therefore, be composed of a cross section of the community. Rather, it will be composed of a group of persons who are uncommonly predisposed to favor the prosecution, a jury "organized to convict."

[T]he Haney study provides strong empirical support for what trial lawyers and judges already know, and that is, that regardless of the preconceptions which a juror might have before entering the courtroom, the questions and the answers have a clear tendency to suggest that the defendant is guilty. Death qualification, then, is comparable to saturating the jury pool with prejudicial pretrial publicity, which, as we know, is unconstitutional. *** But the death qualification process is worse because the biasing information is transmitted to the prospective jurors inside the courtroom and is imparted, albeit unconsciously, not only by the attorneys

but also by the judge.

> Grigsby v. Mabry, supra, (33 Cr.L. at 2478)

The District Court in Grigsby concluded that the exclusion of persons who adamantly oppose the death penalty but could be impartial at the guilt-innocence phase is unconstitutional, and further concluded that "most of the state's legitimate interest can be accomodated by requiring completely bifurcated trials in capital cases -- with one jury to determine the guilt [or] innocence of the defendant and another jury to determine the penalty if the defendant is convicted." The court observed:

> [T]he State's principal interest in preserving death qualification or the death qualification process boils down to a question of efficiency and money. The State simply does not want to pay the expense of having two separate juries, one to determine guilt and the other, if necessary, to determine penalty.
>
> If such a bifurcated system were established, would it mean that in every case in which the State sought the death penalty two separate juries would have to be impaneled? The answer is, obviously, no.
>
> Grigsby v. Mabry, supra (33 Cr.L. at 2478)

The District Court pointed out that a second jury would need to be empaneled only if the guilt phase resulted in a conviction of capital murder, and only if the state continued to seek the death penalty and to insist upon its consideration by a fully death-qualified jury, and concluded that:

> ...the state's interests in using the present death-qualification system in capital cases cannot justify its effects on guilt determinations in capital cases. Nor can such interests justify the destruction of the representativeness of the juries which result from death qualification. In sum, the respondent has failed to carry its burden of justifying the use of nonrepresentative and partial juries in the trial of the guilt or innocence of those accused of capital crimes.
>
> Grigsby v. Mabry, supra (33 Cr.L. at 2479)

The State of Florida's interest in using its present death-qualification system in capital cases is even less

compelling than Arkansas'. Under Arkansas' death penalty statute, the jury must be unanimous in order to impose a death sentence; if the jury does not unanimously agree to the death sentence and to all the written findings required by the statute, the judge must impose a sentence of life imprisonment. Arkansas Criminal Code (1977) §41-1302. Consequently, imposition of the death penalty would be impossible in any case where even one juror absolutely refused to consider voting for a death sentence regardless of the evidence and the law. Yet, notwithstanding this possibility, the District Court in Grigsby held that the state must protect its interest by providing for separate juries in the two phases of a capital trial, rather than requiring the guilt or innocence of the accused to be determined by a jury which is predisposed by the death-qualification process to find him guilty. Under Florida's death penalty statute, a death recommendation need not be unanimous, but may be returned by a majority, i.e. seven jurors. See Rose v. State, 425 So.2d 521, 525 (Fla. 1982). Thus it would take no fewer than six jurors unalterably opposed to the death penalty under any circumstances to render it impossible for the state to secure a death recommendation. Under these circumstances, if there are one or two "death-scrupled" jurors on a jury which has just convicted a defendant of first degree murder, rather than empaneling a new jury the state might well prefer to have the same jury hear the penalty phase notwithstanding the fact that there are one or two "life" votes to start out with. The prosecutor would simply be in the position of having to convince seven out of the eleven other jurors or seven out of the ten other jurors that the circumstances of the case warrant a death sentence; and that is a far less onerous burden than most states (which require that a death verdict be unanimous) impose on him at the outset. Bear in mind also that the prosecutor will have a minimum of ten peremptory challenges available to him. Fla.R.Cr.P. 3.350(a). Petitioner submits that in the highly improbable event that there is any

county in Florida in which, even after the prosecutor has exercised his peremptory challenges, there could remain six or more people on the jury who are unalterably opposed to the death penalty under all circumstances, then unquestionably the death penalty does not comport with the conscience of that particular community and should not be imposed there in any event. See Witherspoon v. Illinois, supra, 391 U.S. at 519-20.[2]

The issues regarding "death-qualification" of juries obviously impact on virtually every capital case which will be tried in all states which allow the death penalty. The conflict among various appellate courts which exists in regard to these issues is illustrated by the opinion of the Arkansas Supreme Court in Rector v State, __S.W.2d__ (Ark. 1983)(opinion filed October 17, 1983)(34 Cr.L. 2111), which angrily rejects the Grigsby rationale in an opinion which, petitioner submits, demonstrates that an appellate court can be as "guilt-prone" as any death-qualified jury. Numerous comments in the Rector opinion reveal that the underlying basis of the Arkansas Supreme Court's decision is the presumption that a person accused of a capital crime is in fact guilty; a profoundly disturbing inversion of the constitutional presumption of innocence.

> For this discussion we assume *** that death-qualified jurors are more prone to convict than those excluded under Witherspoon. The question, then, is this: Should jurors unalterably oppose to capital punishment be permitted to participate in the determination of guilt or innocence in capital cases? We are firmly of the view that their exclusion is proper, for either of two reasons.

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[2] There is yet another peculiarity in Florida's death penalty statute, in addition to the fact that a death recommendation may be returned by a simple majority, which negates the asserted rationale for death-qualifying the jury. This is the "life-override" provision which allows the trial court to impose a death sentence even if the jury recommends life (as happened in the instant case and scores of other Florida capital cases). Thus even twelve "death-scrupled" jurors cannot block a death sentence if the judge is determined to impose it. Appellant is relegating this sub-argument to footnote status only because it is his emphatic position that "life-overrides" are unconstitutional. See Question II, infra.

First, we cannot regard conviction-proneness either as inherently wrong or as destructive of the juror's impartiality. In the various studies on the subject there is almost uniformly an undercurrent of thought, not expressed but easily sensed, that jurors who believe in the death penalty are by their nature barbarians in modern society. That view certainly condemns most Americans. ***

We have no reason to doubt that any tendency of a particular juror, not inflexibly opposed to the death penalty, to lean toward conviction in capital cases arises from one of the most deeply rooted feelings in human nature: an instinctive urge to condemn injustice. *** It cannot be expected that a juror's ability to reason with complete detachment will be wholly unaffected by such an uncontrollable reaction of human nature to shocking injustice. ***

Human nature is not unconstitutional. From the earliest days of the common law ***, the human urge to redress manifest wrongs played its part in the development of the criminal law.***

We may ask, why should the most cowardly and contemptible of criminals, merely by reason of the viciousness of their crimes, be favored in jury selection to a greater degree than any other accused person or any litigant in a civil case? The studies opposing death-qualified juries present no answer to that question.

One would expect the most upright and moral veniremen to be the ones most deeply outraged by the type of crime for which the prosecution seeks the death penalty. Must we say that a jury composed of such veniremen cannot be regarded as impartial? On this point a clear indication of legislative policy is to be found in the federal and Arkansas statutes excluding convicted felons from jury service. *** Unquestionably that exclusion is intended to bar from the jury box the one class of persons least likely to respect and give effect to the criminal laws. Are those statutes unconstitutional as depriving an accused of jurors not prone to convict? Obviously not. In harmony with that legislative point of view, we can find no unconstitutional impartiality in the makeup of a death-qualified jury.

Our second reason for disagreeing with the Grigsby conclusion is a practical one: A jury system that has served its purpose admirably throughout the nation's history ought not to be twisted out of shape for the benefit of those persons least entitled to special favors. ***

Rector v. State, supra (34 Cr.L. 2111-12)

What the Arkansas Court has lost sight of is the fact that the main purpose of a capital trial is not to express outrage at the injustice of the crime, or to determine whether the perpetrator of such a crime is cowardly and contemptible, the main purpose is to determine whether the person accused of the crime committed it, and the constitution requires that, unless and until the state proves its case beyond a reasonable doubt, the jurors must presume that he did not. "Death-qualification" of the jury, as recognized in Grigsby (and as unintentionally revealed by Rector), results in a jury which is uncommonly predisposed to convict, and thereby deprives the accused of his Sixth and Fourteenth Amendment right to an impartial jury. Petitioner requests that this Court grant certiorari in this case to resolve this important issue.

QUESTION II

**TO THE EXTENT THAT IT AUTHORIZES THE TRIAL JUDGE TO OVERRIDE A JURY'S RECOMMENDATION OF LIFE IMPRISONMENT AND IMPOSE A DEATH SENTENCE IN ITS STEAD, FLORIDA'S DEATH PENALTY STATUTE VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND THE GUARANTEE AGAINST CRUEL AND UNUSUAL PUNISHMENT CONTAINED IN THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION.**

The Supreme Court of Florida, relying on this Court's approval of Florida's death penalty statute in Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976) has rejected constitutional challenges to the trial court's statutory authority to override a jury's life recommendation. See e.g., Douglas v. State, 373 So.2d 895 (Fla. 1979); Johnson v. State, 393 So.2d 1069 (Fla. 1980); Porter v. State, 429 So.2d 293 (Fla. 1983); Routly v. State, __So.2d__ (Fla. 1983)(case no. 60,066, opinion filed September 22, 1983). It is petitioner's position that the assumption which underlies all of the decisions upholding the constitutionality of the override procedure -- i.e. that the override is designed as a safeguard against unreasoned imposition of the death penalty -- has proven to be faulty. The override option, in practice, is not a safeguard but a gauntlet; a "fallback" opportunity for the state to persuade the judge to impose the death penalty, in the event that it fails to persuade the jury. For this reason, petitioner submits that the trial court's authority to override a jury's life recommendation is, as applied, violative of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution.

In Dobbert v. Florida, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed. 2d 344 (1977) the defendant contended that application of Florida's post-Furman death penalty statute in his case violated the prohibition against ex post facto laws, since the crimes of which he was convicted occurred before the enactment of the statute. He claimed, inter alia, that at the time the offenses were committed, the trial court was without authority to override the jury's recommendation of mercy, while under the new statute a life recommendation could be (and in his case, was) overridden. This Court held that the ex post facto clause was inapplicable,

characterizing the changes in the law as procedural and "on the whole ameliorative". Dobbert v. Florida, supra, 432 U.S. at 292. Referring to the Tedder standard,[3] the Court said:

> This crucial protection demonstrates that the new statute affords significantly more safeguards to the defendant than did the old. Death is not automatic, absent a jury recommendation of mercy, as it was under the old procedure. A jury recommendation of life may be overridden by the trial judge only under the exacting standards of Tedder. Hence, defendants are not significantly disadvantaged vis-a-vis the recommendation of life by the jury; on the other hand, unlike the old statute, a jury determination of death is not binding. Under the new statute, defendants have a second chance for life with the trial judge and a third, if necessary, with the Florida Supreme Court. No such protection was afforded by the old statute.
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> Dobbert v. Florida, supra, 432 U.S. at 295-96

In State v. Dixon, 283 So.2d 1 (Fla. 1973), the case in which the state Supreme Court upheld the constitutionality of Florida's death penalty statute, it said:

> It is necessary at the outset to bear in mind that all defendants who will face the issue of life imprisonment or death will already have been found guilty of a most serious crime, one which the Legislature has chosen to classify as capital. After his adjudication, this defendant is nevertheless provided with five steps between conviction and imposition of the death penalty -- each step providing concrete safeguards beyond those of the trial system to protect him from death where a less harsh punishment might be sufficient.

Specifically addressing the third of these safeguards, the trial court's authority to reject the jury's recommendation, the Florida Supreme Court said:

> To a layman, no capital crime might appear to be less than heinous, but a trial judge with experience in the facts of criminality possesses the requisite knowledge to balance the facts of the case against the standard criminal activity which can only be developed by involvement with the trials of numerous defendants. Thus the inflamed emotions of jurors can no longer sentence a man to die; the sentence is viewed in the light of judicial

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[3] In Tedder v. State, 322 So.2d 908, 910 (Fla. 1975), the Florida Supreme Court held that "In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ."

experience.

State v. Dixon, supra, at 8

In Thompson v. State, 328 So.2d 1 (Fla. 1976), the Florida Supreme Court wrote:

> This court is well aware that the recommendation of sentence by the jury is only advisory and is not binding on the trial court. However, the advisory opinion of the jury must be given serious consideration, or there would be no reason for the legislature to have placed such a requirement in the statute. It stands to reason that the trial court must express more concise and particular reasons, based on evidence which cannot be reasonably interpreted to favor mitigation, to overrule a jury's advisory opinion of life imprisonment and enter a sentence of death than to overrule an advisory opinion recommending death and enter a sentence of life imprisonment.

Even before the Furman decision, the possibility of a two-step jury determination of guilt and punishment in capital cases was suggested by Chief Justice Ervin of the Florida Supreme Court, concurring in Perkins v. State, 228 So.2d 382, 394 (Fla. 1969). Chief Justice Ervin further suggested:

> Possibly a jury's decision to recommend or not to recommend mercy in a capital case should not be held to preclude the trial judge from determining in his sound discretion the punishment to be imposed upon the defendant in a capital case, provided the defendant timely requests an allocutionary hearing and a final determination by the trial judge of the sentence to be imposed. If such a hearing is requested the jury's nonrecommendation of mercy could be deemed as advisory only. The allocutionary hearing could be held by the trial court as a part of the jury's determination concerning a recommendation, or afterwards, in the discretion of the trial judge.

The only states other than Florida which permit a trial judge to impose a sentence of death notwithstanding the jury's recommendation of life are Indiana and Alabama. See Judy v. State, 416 N.E.2d 95 (Ind. 1981); Brewer v. State, 417 N.E.2d 889, 898 (Ind. 1981); Bush v. State, 431 So.2d 555, 559 (Ala. Cr.App. 1982). [Each of these cases refers to the override procedure in their respective statutes, but none of them is a "life override" case. As far as petitioner has been able to determine, neither the Indiana nor the Alabama appellate courts have yet had occasion to decide a case in which a trial court overrode a jury's life recommendation and imposed a death

sentence. In contrast, the Florida Supreme Court has decided 57 such cases and many more are pending]. The Indiana Supreme Court first had occasion to review a death sentence imposed under its present statute in Judy v. State, supra at 108, and stated:

> Our review of these various constitutional and statutory requirements and our rules satisfies us that our sentencing scheme passes constitutional muster. Under our procedure, the sentencing authority's discretion, as exercised by the jury and the trial court, "is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition." Proffitt v. Florida, supra, 428 U.S. at 258, 96 S.Ct. at 2969, 49 L.Ed.2d at 926. Significantly, in cases tried to a jury, the trial court may not simply rely solely on the jury's advice; rather, he must conduct this analysis independent of the evaluation and recommendation made by the jury. In this fashion, the trial court, as the actual sentencing authority, provides an additional safeguard against a death penalty recommendation which may have been prompted by improper factors. Of course, the trial court must analyze the case in the same independent manner if it is tried only to him.

The fact that Florida trial courts, in practice, make liberal use of the override option to impose a death sentence despite a life recommendation is instantly revealed by a glance at Walsh v. State, 418 So.2d 1000, 1003-04 (Fla. 1982). In its July 29, 1982 opinion in Walsh, the Court listed 8 cases in which it had affirmed a death sentence imposed after a life recommendation override, and 23 cases in which it had reversed a death sentence imposed after a life recommendation override, with directions to impose a life sentence. Walsh itself falls into the latter category. Nine "life override" cases decided up to that point were not listed in Walsh.[4] Fourteen "life

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[4] Taylor v. State, 294 So.2d 648 (Fla. 1974) (death sentence reversed); Gardner v. State, 313 So.2d 675 (Fla. 1975) (death sentence affirmed); Sawyer v. State, 313 So.2d 680 (Fla. 1975) (death sentence affirmed); McCrae v. State, 395 So.2d 1145 (Fla. 1980) (death sentence affirmed); Jacobs v. State, 396 So.2d 713 (Fla. 1981) (death sentence reversed); Lewis v. State, 398 So.2d 432 (Fla. 1981) (remanded for resentencing); Miller v. State, 415 So.2d 1262 (Fla. 1982) (death sentence affirmed); McCray v. State, 416 So.2d 804 (Fla. 1982) (death sentence reversed); and Gilvin v. State, 418 So.2d 996 (Fla. 1982) (death sentenced reversed).

override" cases have been decided in the seventeen months since Walsh.[5] Two decisions involved co-defendants who were both sentenced to death after each received a life recommendation.[6] Altogether, the Florida Supreme Court has reviewed 57 death sentences imposed under the present statute after a jury recommended life. Treating the instant case as an affirmance and Lewis v. State as a reversal, there have been 19 occasions in which the Court has affirmed a death sentence following the trial court's override of the jury's life recommendation.

In stark contrast, the occasions in which a trial judge has utilized the "safeguard" of the override procedure to reject a jury recommendation of death -- the original and primary justification for the availability of the override option -- are few and far between. It is not possible to say exactly how rare a creature is the "death recommendation override" for the reason pointed out by Justice England, dissenting as to penalty in Alvord v. State, 322 So.2d 533, 542 n.2 (Fla. 1975):

> Since we do not have jurisdiction to review capital cases resulting in a sentence of life imprisonment (absent some other basis for our jurisdiction), we have no idea how many persons convicted of capital crimes have avoided a judge's sentence of death. Nor do we know what the juries recommended in those cases.

The routine use of the override to nullify jury life recommendations as opposed to its primary intended purpose as a safeguard against unreasonable death recommendations is indicative of a serious malfunction in the operation of the Florida

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5 Stevens v. State, 419 So.2d 1058 (Fla. 1982) (death sentence affirmed); Bolender v. State, 422 So.2d 833 (Fla. 1982) (death sentence affirmed); McCampbell v. State, 421 So.2d 1072 (Fla. 1982) (death sentence reversed); Porter v. State, 429 So.2d 293 (Fla. 1983) (death sentence affirmed); Norris v. State, 429 So.2d 688 (Fla. 1983) (death sentence reversed); Cannady v. State, 427 So.2d 723 (Fla. 1983) (death sentence reversed); Webb v. State, 433 So.2d 496 (Fla. 1983) (death sentence reversed); Washington v. State, 432 So.2d 44 (Fla. 1983) (death sentence reversed); Spaziano v. State, 433 So.2d 508 (Fla. 1983) (death sentence affirmed); Hawkins v. State, 436 So.2d 44 (Fla. 1983) (death sentence reversed); Richardson v. State, 437 So.2d 1091 (Fla. 1983) (death sentence reversed); Engle v. State, __So.2d__ (Fla. 1983) (remanded but life override approved); Herzog v. State, __So.2d__ (Fla. 1983) (death sentence reversed); Routly v. State, __So.2d__ (Fla. 1983) (death sentence affirmed).

6 Barclay v. State, 343 So.2d 1266 (Fla. 1977) (Barclay and Dougan, death sentences affirmed); McCaskill v. State, 344 So.2d 1276 (Fla. 1977) (McCaskill and Williams, death sentences reversed).

death penalty statute. Either the state of Florida has a severe probelm with unreasonably lenient jurors (a possibility which petitioner submits is remote, especially in light of the fact that death penalty juries do not include those citizens of the state who would never impose the death penalty regardless of the circumstances)[7] or else there is a clear pattern of abuse of the override option on the part of trial judges. The Florida Supreme Court's review under the Tedder standard does not cure the problem. As the Fifth Circuit Court of Appeals observed in Spinkellink v. Wainwright, 578 F.2d 582, 605 (5th Cir. 1978), "reasonable persons can differ over the fate of every criminal defendant in every death penalty case." If a death sentence following a jury recommendation of life can be sustained only where no reasonable person would differ, does this mean that Justices McDonald and Overton were unreasonable to dissent in Stevens v. State, supra; Miller v. State, supra; and Johnson v. State, supra? Was Justice England unreasonable to dissent in Hoy v. State, 353 So.2d 826 (Fla. 1977), and was Governor Graham unreasonable to grant clemency in Hoy's case? Was Justice Boyd unreasonable to dissent as to one of the co-defendants in Barclay v. State, 343 So.2d 1266 (Fla. 1977)?

The impossibility of proper review under the Tedder standard as presently applied is further demonstrated by the fact that a Florida jury makes no express findings in support of its recommendation of life or death. Thus, while the result on appeal of a life recommendation override turns on whether the jury's recommendation was "reasonable" or "unreasonable", the absence of specific findings makes it impossible for the reviewing court even to know what the basis for the jury's recommendations was. As a result, the parties and the appellate court must speculate about the reason for the recommendation [see Gilvin v. State, supra, (Boyd J. dissenting from reduction of sentence)] before reaching a conclusion as to its validity.

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[7] See e.g. Witt v. State, 342 So.2d 497, 499 (Fla. 1977); Downs v. State, 386 So.2d 788, 790-01 (Fla. 1980), upholding the practice of "death-qualifying" jurors in capital cases. But see Grigsby v. Mabry, supra.

When applied in this manner, the Tedder standard is simply too amorphous to pass constitutional muster.

The nebulous nature of the Tedder standard is further illustrated by focusing on particular decisions of the Florida Supreme Court in "life override" cases. In those cases in which the Court reverses the death penalty and remands for imposition of a life sentence in accordance with the jury's recommendation, the Court tends to (properly) analyze the evidence in terms of what considerations might the jury have based its recommendation on, and could those factors reasonably support its decision to recommend life. See e.g. Welty v. State, 402 So.2d 1159, 1164-65 (Fla. 1981); Gilvin v. State, 418 So.2d 996, 999 (Fla. 1982); Cannady v. State, 427 So.2d 723, 731 (Fla. 1983); Washington v. State, 432 So.2d 44, 48 (Fla. 1983). The Florida Supreme Court has said that where reasonable persons can differ over the fate of a capital defendant, it is the jury's determination, and not the judge's, which must be given effect. Provence v. State, 337 So.2d 783, 787 (Fla. 1976). This is true even if the judge's findings as to the aggravating and mitigating circumstances also appear to be reasonable or are supported by the evidence; where there is any view of the evidence from which the jury could reasonably have recommended life, the trial court is not free to substitute his own judgment to override it. See Gilvin v. State, supra; Cannady v. State, supra; Chambers v. State, 339 So.2d 204, 208 (Fla. 1976)(England, J. concurring). On the other hand, in those cases in which the Florida Supreme Court affirms the imposition of the death sentence notwithstanding the jury's recommendation of life, the Court tends to analyze the case only in terms of whether the evidence was sufficient to support the judge's findings as to the aggravating and mitigating circumstances. See e.g. McCrae v. State, 395 So.2d 1145, 1153-55 (Fla. 1980); Buford v. State, 403 So.2d 943, 951-53 (Fla. 1981); Routly v. State, __So.2d__ (Fla. 1983)(case no. 60,066, opinion filed September 22, 1983); Stevens v. State, 419 So.2d 1058, 1065 (Fla. 1982) [note that Stevens was the co-defendant in the

crime of which petitioner was convicted], and the instant case, Engle v. State, 438 So.2d 803, 812 (Fla. 1983)[App.A.10]. Compare Gilvin and Cannady on the one hand, with McCrae and Buford on the other, with regard to the Florida Supreme Court's treatment of the respective appellants' arguments that the jury's life recommendation might have been based on evidence presented by the defense in mitigation which the judge refused to find as a mitigating circumstance. In Gilvin, the Court said:

> As to his sentence of death, however, we agree with Gilvin's argument that the trial court erroneously overrode the jury's life recommendation. The trial court found several aggravating circumstances, some of which constitute an improper doubling up under our pronouncement in Provence v. State, 337 So.2d 783 (Fla. 1976), cert. denied, 431 U.S. 969, 97 S.Ct. 2929, 53 L.Ed. 2d 1065 (1977), and found no mitigating factors. There was evidence of nonstatutory mitigating factors, however, upon which the jury could have based its life recommendation even though the trial court, in its judgment, was not necessarily compelled to find them.
>
> Gilvin v. State, supra, at 999

In Cannady, the Court said:

> Appellant also argues that the trial court erred in not finding as mitigating circumstances that he was under the influence of extreme mental or emotional distress, under section 921.141-(6)(b), and that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired, under section 921.141(6)(f). Appellant refers us to the testimony of Dr. Hord who asserted that due to extensive drug usage appellant was suffering from some mental or emotional disturbance and was unable to appreciate the criminality of his conduct or conform his conduct to the requirements of law. The trial court considered Dr. Hord's testimony both at the trial and at the suppression hearing but expressly found that these mitigating circumstances were not applicable. Although the trial court found that appellant was an indiscriminate user of a wide variety of drugs, it concluded that appellant's conduct in committing the robbery and kidnapping, fleeing from the scene of the crime, and disposing of the evidence conclusively showed that appellant was able to reason and understand the nature of his actions. The trial judge's conclusions were within his domain as the trier of fact. Smith v. State, 407 So.2d 894 (Fla. 1981), cert. denied, __U.S.__, 102 S.Ct.

2260, 72 L.Ed.2d 864 (1982); Lucas v. State, 376 So.2d 1149 (Fla. 1979).

> However, the jury may have given more credence to Dr. Hord's testimony than the trial judge in reaching its recommendation. The jury could have found that appellant was under mental or emotional disturbance and that he was unable to conform his actions to the requirements of law even though the trial court was not necessarily compelled to reach the same conclusions. Gilvin v. State, 418 So.2d 996 (Fla. 1982); Chambers v. State, 339 So.2d 204, 208 (Fla. 1976)(England, J., concurring). Thus the jury's recommendation of life sentence could have been based upon these statutory mitigating circumstances. Shue v. State, 366 So.2d 387 (Fla. 1978); Burch v. State, 343 So.2d 831 (Fla. 1977). The jury's recommendation of a life sentence could have also been partially based upon appellant's lack of significant criminal activity and upon his age. See McKennon v. State, 403 So.2d 389 (Fla. 1981); Stokes v. State, 403 So.2d 377 (Fla. 1981). In light of all these mitigating circumstances, there is a reasonable basis for the jury's recommendation of a life sentence.
>
> Cannady v. State, supra, at 731

See also Welty v. State, supra, at 1164 ("Although the trial court found no mitigating factors, there was evidence introduced by Welty relative to nonstatutory mitigating factors which could have influenced the jury to return a life recommendation").

Gilvin and Cannady are impossible to square with McCrae and Booker. In McCrae, the psychiatrist who testified at the penalty phase of the trial "stated that McCrae was subject to attacks when under emotional stress which prevented him from exercising the restraint which would be present in a normal individual. Although the doctor stated that [McCrae] was not insane, he did determine that McCrae suffered from a chronic schizophrenic illness and that he was unlikely to cooperate with defense counsel." McCrae v. State, supra, at 1148. Rather than concluding, as it did in Cannady, that the jury was entitled to find that the defendant was mentally or emotionally disturbed or unable to conform his conduct to the requirements of law, even though the trial court was not necessarily compelled to find these mitigating circumstances, the Florida Supreme Court said:

> The final sentencing issue concerns the appellant's attempt to prove in mitigation under section 921.141(6)(b) that he was under the influence of extreme mental or emotional disturbance at the time the crimes were committed. In our view, the trial judge rejected this mitigating circumstance. The judge noted in his findings of fact that "the mitigating circumstances are very minor" and that the aggravating circumstances "greatly outweigh any mitigating circumstances." As to this specific mitigating circumstance, however, the trial judge remarked that the doctor through whose testimony appellant submitted his proof, "could not with any degree of medical certainty" say that appellant satisfied the criteria of subsection (6)(b). However, it is apparent to us that the jury must have found this mitigating circumstance to exist. There is no other explanation for their advisory verdict in view of the heinous nature of the killing. We find their recommendation has no reasonable basis under the circumstances of this cause.
>
> McCrae v. State, supra, at 1154-55

Similarly, in Buford v. State, supra, in which there was evidence before the jury that for several weeks prior to the crime the defendant had been extensively under the influence of alcohol, drugs, and marijuana, the Florida Supreme Court focused not on whether the jury might reasonably have found the mitigating circumstance of impaired mental capacity and based its life recommendation thereon, but rather concluded that the trial court could properly reject this mitigating circumstance because "[o]bviously the ability of the defendant to give a detailed account of the crime was inconsistent with the contention that he had a diminished or impaired mental capacity because of excessive consumption of alcohol, drugs, and marijuana." Buford v. State, supra, at 953.

What the cases indicate is a tendency on the part of the Florida Supreme Court to reason backwards in "life override" cases -- when they reverse, they analyze the evidence as it relates to the possible bases for the jury's life recommendation; when they affirm, they analyze the evidence as it relates to the trial court's findings. The instant case is an illustration. In his brief on appeal, petitioner noted that trial counsel argued to the jury in the penalty phase that the

following considerations weighed in favor of a life sentence:

> Through counsel, the appellant countered the appellee's argument by urging that the evidence against him was very weak (T-1005; 1007); that the evidence was circumstantial (T-1004-1005; 1021); that there was no evidence of what participation he had in the offense, if any, after going to the robbery (T-1008; 1021-1022); that from the evidence, length of deliberations, and questions during deliberations, that the jury had found him guilty as an accessory and accomplice to Rufus Stevens (T-1004-1005; 1007-1009; 1010; 1013-1014; 1016-1017; 1022); that by all the evidence he did not take the victim's life (T-1009-1010); 1013-1014; 1017; 1019; 1022); that because he had been found guilty on a principal theory as an accomplice to Rufus Stevens while the statutory aggravating circumstances argued by the appellee might apply to Rufus Stevens they did not apply to him (T-1011-1014).
>
> Pursuant to Section 921.141(6), Florida Statutes, the appellant argued that the following statutory mitigating circumstances applied to him: Section 921.141-(6)(a), Florida Statutes -- no significant history of prior criminal activity (T-1014); Section 921.141(6)(d), Florida Statutes, -- that he was an accomplice not the killer (T-1015-1016); Section 921.141(6)(e), Florida Statutes, -- that he acted under the substantial domination of another person (Rufus Stevens)(T-1016; 431;456) and Section 921.141(6)(g), Florida Statutes, -- his age (T-1017).
>
> [App.E.17-18, see App.B.11-15]

The Florida Supreme Court, however, in purporting to apply the Tedder standard, was silent on the question of whether the jury could reasonably have found any statutory or non-statutory mitigating circumstances and based its life recommendation thereon. Instead, the Court commented only on the trial court's findings, with which it agreed, and approved the court's override of the jury's recommendation:

> The trial judge found four aggravating circumstances, to wit: that the murder was committed after appellant had engaged in a kidnapping and rape, that it was committed to avoid a lawful arrest, that it was committed for pecuniary gain, and that it was especially heinous, atrocious, and cruel. He found no mitigating circumstances. Review of the record demonstrates the validity and propriety of the above findings.
>
> Appellant contends, with regard to said findings, that the judge committed several errors. First, he contends that

> the judge "manifestly overlooked and failed to consider" any nonstatutory mitigating circumstances. It appears from the record, however, that the trial judge did consider such and simply found that none existed.
>
> Engle v. State, supra, at 812 [App.A. 10]

Petitioner submits that either the Florida Supreme Court seriously misapplied the Tedder standard in the instant case, or, more likely, that the Tedder standard is so vague and amorphous as to be incapable of even application.

As asserted in the beginning of this argument, the trial court's override power has proven not to be a safeguard against unreasonable jury recommendations of death. Assuming arguendo that the state has a valid interest in ensuring against "unreasonable" recommendations of life, that interest is already more than adequately protected by the state's ability to weed out prospective jurors who adamantly oppose the death penalty, and by the fact that a Florida penalty jury's recommendation need not be unanimous (thus preventing one or two or even five "unreasonable" jurors from blocking a reasonable death recommendation). Only in the event that six to all twelve members of the jury, all of whom have stated under oath that they will follow the law and can impose the death penalty under appropriate circumstances, conclude that under the circumstances of the particular case the death penalty is not appropriate, is a life recommendation returned.

In determining whether a penal sanction comports with the Eighth Amendment ban against cruel and unusual punishment, assessment of contemporary values is required. Trop v. Dulles, 356 U.S. 86, 100-01, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958); Gregg v. Georgia, 428 U.S. 153, 175, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). The critical function performed by capital sentencing juries in assessing Eighth Amendment values was aptly described in Witherspoon v. Illinois, 391 U.S. 510, 519-20 and n.15, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968):

> [A] jury that must choose between life imprisonment and capital punishment can do little more -- and must do nothing less -- than express the conscience of the community on the ultimate question

of life or death.

* * *

> And one of the most important functions any jury can perform in making such a selection is to maintain a link between contemporary community values and the penal system -- a link without which the determination of punishment could hardly reflect 'the evolving standards of decency that marks the progress of a maturing society.'

A jury's life recommendation reflects the determination that, in the individual case before it, imposition of the death penalty does not accord with contemporary values. Only three states, Florida, Indiana, and Alabama, have death penalty statutes which permit a jury's recommendation of life to be nullified. Only in Florida does it appear that jury life recommendations are commonly, perhaps even routinely, ignored. [See Burch v. Louisiana, 441 U.S. 130, 138 (1979), recognizing that the "near-uniform judgment of the Nation provides a useful guide in delimiting the line between those jury practices that are constitutionally permissible and those that are not"]. Florida's override procedure has been approved by the Florida Supreme Court and by this Court on the assumption that it serves as a safeguard against unreasoned jury death verdicts. It is becoming more and more apparent that the override does not serve this function, and that in fact it operates in many cases, as in the present case, to deprive a capital defendant of an entirely reasonable life verdict. For this reason, the constitutionality of a trial judge's authority to override a jury's life recommendation can no longer be upheld.

## CONCLUSION

WHEREFORE, the petition for writ of certiorari should be granted.

Respectfully submitted,

STEVEN L. BOLOTIN
Assistant Public Defender
Second Judicial Circuit
Post Office Box 671
Tallahassee, Florida 32302
(904) 488-2458

ATTORNEY FOR PETITIONER

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petition for Writ of Certiorari has been furnished by U.S. Mail to the Honorable Alexander L. Stevas, Clerk of the Supreme Court of the United States, First and Maryland Avenue, N.E., Washington, DC 20543; Gregory Scott Engle, #069240, Florida State Prison, Post Office Box 747, Starke, Florida 32091; and copies furnished by hand delivery to the Honorable Sid White, Clerk of the Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32301 and to Raymond L. Marky, Assistant Attorney General, The Capitol, Tallahassee, Florida 32301 on this 3rd day of January, 1984.

STEVEN L. BOLOTIN

NO. 83-6043

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

---

GREGORY SCOTT ENGLE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

---

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS .

---

GREGORY SCOTT ENGLE, petitioner in the above-styled cause, hereby moves this Court, by his undersigned counsel, for leave to proceed in forma pauperis and in support hereof shows as follows:

1. An affidavit signed by petitioner is attached hereto, wherein petitioner sets forth the fact that he is indigent and unable to pay or give security for the fees and costs attendant to this proceeding.

2. Petitioner was adjudged insolvent for the purpose of appeal in the Florida Supreme Court and was represented there by appointed counsel.

WHEREFORE, it is respectfully requested that petitioner be permitted to proceed in forma pauperis in this matter.

Respectfully submitted,

Steven L. Bolotin

STEVEN L. BOLOTIN
Assistant Public Defender
Second Judicial Circuit
Post Office Box 671
Tallahassee, Florida 32302
(904) 488-2458

ATTORNEY FOR PETITIONER

NO. 83-6043

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

---

GREGORY SCOTT ENGLE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

---

I, GREGORY SCOTT ENGLE, being duly sworn, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees and to proceed in forma pauperis:

1. I am the petitioner in the above-entitled case.

2. Because of my poverty I am unable to pay the costs of said cause; I own no real or personal property; I am incarcerated and receive no income from earnings.

3. I am unable to give security for said cause.

4. I believe that I am entitled to the redress I seek in said cause.

Gregory Scott Engle

GREGORY SCOTT ENGLE

STATE OF FLORIDA,

COUNTY OF Bradford

The foregoing affidavit of GREGORY SCOTT ENGLE was subscribed and sworn to before me this 28 day of November 1983.

NOTARY PUBLIC, STATE OF FLORIDA

MY COMMISSION EXPIRES:

NOTARY PUBLIC, STATE OF FLORIDA
My Commission Expires Oct. 4, 1986

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion for Leave to Proceed In Forma Pauperis has been furnished by U.S. Mail to the Honorable Alexander L. Stevas, Clerk of the Supreme Court of the United States, First and Maryland Avenue, Northeast, Washington, DC 2-543; Mr. Gregory Scott Engle, #069240, Florida State Prison, Post Office Box 747, Starke, Florida 32091; and by hand delivery to the Honorable Sid White, Clerk of the Supreme Court, State of Florida, Tallahassee, Florida 32301 and to Raymond L. Marky, Assistant Attorney General, The Capitol, Tallahassee, Florida 32301 on this 3 day of January, 1984.

Steven L Bolotin

STEVEN L. BOLOTIN
Assistant Public Defender

NO. 83-6043

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

---

GREGORY SCOTT ENGLE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

---

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS

I, GREGORY SCOTT ENGLE, being first duly sworn, depose and say that I am the Gregory Scott Engle, in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the issues which I desire to present on appeal are as stated in the Petition.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed?

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

   b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? No

a. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account?

a. If the answer is yes, state the total value of

No the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? No

a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

None

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Gregory Scott Engle
GREGORY SCOTT ENGLE

STATE OF FLORIDA
COUNTY OF Bradford

The foregoing affidavit of Gregory Scott Engle was subscribed and sworn to before me on this 9 day of January 1984.

J W Warren
NOTARY PUBLIC, STATE OF FLORIDA

MY COMMISSION EXPIRES:

NOTARY PUBLIC, STATE OF FLORIDA
My Commission Expires Oct. 4, 1986

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

---

GREGORY SCOTT ENGLE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

---

# APPENDIX

---

STEVEN L. BOLOTIN
ASSISTANT PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT
POST OFFICE BOX 671
TALLAHASSEE, FLORIDA 32302
(904) 488-2458

ATTORNEY FOR PETITIONER

(MEMBER OF THE BAR
OF THIS COURT)

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effort to determine the just values of the subject parcels as of the first day of each tax year in accordance with recognized appraisal principles and the valuation criteria specified in Section 193.011, Florida Statutes. The subject assessments were made on the basis of careful study of the subject properties as well as diligent investigation and careful consideration of available market data. The subject assessments and the massive amount of data collected by the property appraiser's staff have been painstakingly reviewed and analyzed by statistical techniques and other methods. Although [appellees] have made a mighty effort to find some fault in the assessments made by the Volusia County Property Appraiser, or in the manner in which he made them, [appellees] failed to do so. Credit should be given where credit is due. The [appellees'] painstaking, critical scrutiny of the subject assessments in these actions has revealed that the Volusia County Property Appraiser and his staff conscientiously complied with the law as stated in Section 193.481, and did so in a highly competent, professional manner.

Accordingly, we disagree with the decision of the Fifth District Court of Appeal. We find that section 193.481 has not been unconstitutionally applied and that the assessments on the respondents' subsurface property rights are lawful and valid.

[5] However, we expressly decline to approve the trial court's injunction against the Department of Revenue. This Court answered the question of whether a cause of action lies against the Department to compel equalization of ad valorem tax valuations where real property situated in one county is assessed on the basis of a higher value than that assigned to allegedly identical property located in another county in *Straughan v. GAC Properties*. We declined to hold that the Department could be so compelled merely on the basis of an allegation that different values had been assigned to adjacent properties of like character in different counties. The factual distinctions in this case do not warrant a contrary result and, thus, this Court's holding in *Straughan* is dispositive on the issue of the validity of the trial court's injunction.

We point out that the property owners suffer no financial detriment whatsoever by virtue of any lack of such separate assessments elsewhere. The lack of such separate assessments merely means that the entire just value is assessed against the surface owner.

The decision of the district court of appeal is quashed in part and approved in part. We agree with the trial judge that the mandatory provision of section 193.481, Florida Statutes (1981), must be implemented. However, this must be done without retention of jurisdiction by the trial court. That portion of the district court of appeal decision which reversed the part of the trial court's order directing the Department of Revenue to do certain acts is approved. The trial judge had no authority to enter that part of the final judgment. In all other respects the final judgment of the trial judge is approved.

This cause is remanded to the District Court of Appeal with instructions to affirm that portion of the final judgment which we have approved.

It is so ordered.

ALDERMAN, C.J., and BOYD, OVERTON, McDONALD, EHRLICH and SHAW, JJ., concur.

Gregory Scott ENGLE, Appellant,

v.

STATE of Florida, Appellee.

No. 57708.

Supreme Court of Florida.

Sept. 15, 1983.

Rehearing Denied Nov. 4, 1983.

Defendant was convicted in the Circuit Court, Duval County, John E. Santora, Jr.,

J., of first-degree murder, and he appealed. The Supreme Court held that: (1) excusal of two prospective jurors who voiced objections to death penalty did not deny defendant his right to be tried by an impartial jury; (2) defendant was not denied his due process and fair trial rights when trial court allowed the jurors to separate during their deliberations over his guilt and go to their homes for the evening; (3) color photographs of victim were admissible for purpose of corroborating and aiding in description of testimony of certain witnesses; (4) reinstruction on murder in the first degree did not require reinstruction on all degrees of homicide, including manslaughter, and justifiable and excusable homicide; (5) instruction on weight to be given out-of-court statements made by defendant was not reversibly erroneous as misleading; and (6) consideration, in sentencing defendant, of a confession admitted at separate trial of an individual who was found guilty of same murder as defendant operated to unconstitutionally deny defendant an opportunity to cross-examine and confront that individual.

Conviction affirmed, sentence vacated, and cause remanded with instructions.

Alderman, C.J., concurred in part and dissented in part and filed an opinion in which Boyd, J., concurred.

1. Jury ⇐108

One who would vote against death regardless of the facts presented or the instructions given may properly be excused from service on a jury. West's F.S.A. § 921.141(2).

2. Jury ⇐33(1.2)

The excusal of two prospective jurors who voiced objections to the death penalty did not deny the defendant his right to be tried by an impartial jury drawn from a representative cross section of the community in that both of the jurors, who admitted that they would refuse to vote for the death penalty regardless of the facts or the circumstances, had more than general objections to the death penalty. West's F.S.A. § 921.141(2).

3. Constitutional Law ⇐267
Criminal Law ⇐854(4)

Conduct of trial court in allowing the jurors to separate during their deliberations over defendant's guilt and go to their homes for the evening did not deny defendant his due process and fair trial rights where, aside from fact that defense counsel agreed to separation, trial judge admonished the jury not to discuss case with outsiders, and not to read, watch, or listen to any media reports thereon. U.S.C.A. Const. Amend. 14.

4. Criminal Law ⇐854(7)

Rule authorizing trial court, after final submission of cause, to allow jurors to separate and then reconvene was not violated when jury was not sequestered during trial. West's F.S.A. RCrP Rule 3.370(b).

5. Criminal Law ⇐1119(5)

Lack of any indication in record of jury having reconvened in courtroom before retiring for the second time as was required by rule did not mean that such did not occur and, hence, was not a basis for establishing error inasmuch as it was just as logical to conclude that jury did reconvene, or else court reporter would have had no way of knowing that they retired to jury room. West's F.S.A. RCrP Rule 3.370(b).

6. Criminal Law ⇐854(4)

Admonition which trial court gave three days prior to separation of jury during deliberations and which was to effect that jury was not to view scene of crime was sufficient compliance with statutory requirements and did not provide a basis for establishing error when trial court failed to so admonish jury immediately prior to its separation during deliberations. West's F.S.A. § 918.06.

7. Criminal Law ⇐438(1)

Test for admissibility of photographic evidence is relevance.

8. Criminal Law ⇐438(6)

Color photographs of homicide victim were admissible as useful in showing drag marks on victim's body and as corroborat-

ing and aiding in description of testimony of certain witnesses.

9. Criminal Law ⇐438(5)

That there was no dispute regarding occurrence of crime or cause of death did not preclude admission of photographs of homicide victim since defendant could not, by stipulating as to identity of victim and cause of death, relieve State of its burden of proof beyond a reasonable doubt.

10. Criminal Law ⇐438(5)

Introduction of color rather than black and white photographs of homicide victim was not error inasmuch as the State was not limited to use of black and white photos, but was free to select from among the permissible choices the photographs which it wished to use, and color was the preferable choice since the drag marks on the victim's body were not visible in a black and white photo.

11. Criminal Law ⇐863(2)

Once jury inquired during its deliberation as to whether it had to be convinced that defendant killed victim in order to justify a first-degree murder conviction, trial court acted correctly in answering by reinstructing jury on murder in the first degree, murder in the second degree and the law of principals, and did not err in failing to instruct on manslaughter and on justifiable and excusable homicide, inasmuch as jury indicated that it was confused only with regard to degrees of murder and how active a role defendant was required to play in order to be held liable therefor.

12. Criminal Law ⇐1174(6)

Conduct of trial court when, after using word "statement" rather than words "admission" or "confession" in instructing jury on weight to be given out-of-court statements made by defendant, it gave jury a copy of instructions for use during deliberations, but did not in any way delete or cover alternative words "admission" and "confession" which were printed in parentheses following word "statement" was not fundamental, reversible error on ground that jury was somehow misled thereby.

13. Criminal Law ⇐163

A sentence of death imposed by a trial court after a jury recommendation of life imprisonment does not constitute double jeopardy. U.S.C.A. Const.Amend. 5.

14. Criminal Law ⇐1208.1(4)

In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.

15. Criminal Law ⇐1126

Record failed to sustain claim that trial court manifestly overlooked and failed to consider any nonstatutory mitigating circumstances in sentencing defendant to death after jury recommended life imprisonment.

16. Criminal Law ⇐749, 986.2(1)

A trial judge is not limited in sentencing to consideration of only that material put before the jury, is not bound by the jury's recommendation, and is given final authority to determine the appropriate sentence.

17. Constitutional Law ⇐270(1)

Due process rights of defendant were not violated when the State was permitted to argue before the trial judge at sentencing for the applicability of two aggravating factors that have not been argued before the jury. U.S.C.A. Const.Amend. 14.

18. Criminal Law ⇐986.2(1), 986.4(1)

Evidence may be presented during sentencing as to any matters deemed relevant, and trial judge may consider information, such as presentence and psychological reports, which were not considered by jury during its sentencing deliberations.

19. Criminal Law ⇐986.4(1)

Trial court's use of a presentence investigation report on defendant, after jury's recommendation had been received, was not improper as long as defendant's trial counsel was apprised thereof.

28. Criminal Law ⇐662(1), 1181

Consideration, in sentencing defendant, of a confession admitted at separate trial of an individual who was found guilty of same murder as defendant operated to unconstitutionally deny defendant an opportunity to cross-examine and confront that individual and was such as to require a vacation of sentence with instructions to conduct another sentence hearing at which such confession would not be considered. U.S.C.A. Const.Amends. 6, 14.

21. Constitutional Law ⇐268(1), 270(1)

Requirements of due process apply to all three phases of a capital case in the trial court and, thus, to the trial in which the guilt or innocence of the defendant is determined, to the penalty phase before the jury, and to the final sentencing process by the trial court.

22. Constitutional Law ⇐268(6)

The Sixth Amendment right of an accused to confront the witnesses against him is a fundamental right which is made obligatory on the states by the due process of law clause of the Fourteenth Amendment. U.S.C.A. Const.Amends. 6, 14.

23. Criminal Law ⇐662(1)

The primary interest secured by, and the major reason underlying the confrontation clause, is the right of cross-examination, the right of confrontation protected by cross-examination is a right that has been applied to the sentencing process. U.S.C.A. Const.Amends. 6, 14.

24. Criminal Law ⇐422(1)

Statements or confessions made by a codefendant are inadmissible as evidence against defendant at the guilt phase of the trial. U.S.C.A. Const.Amends. 6, 14.

25. Witnesses ⇐300

A defendant cannot require a codefendant to waive his constitutional right to remain silent and force him to testify during the sentencing procedure. U.S.C.A. Const. Amends. 5, 6.

Michael M. Corin, Asst. Public Defender, Second Judicial Circuit, Tallahassee, for appellant.

Jim Smith, Atty. Gen. and Raymond L. Marky, Asst. Atty. Gen., Tallahassee, for appellee.

PER CURIAM.

Appellant, Gregory Scott Engle, was convicted of the first-degree murder of Eleanor Kathy Tolin and sentenced to death despite a jury recommendation of life imprisonment. He now appeals both the conviction and sentence. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const.

The facts are set forth in the trial court's findings in support of the death penalty:

> At approximately 2:00 A.M. on March 13, 1979, Gregory Scott Engle and Rufus E. Stevens plotted to rob the Majik Market and to remove the attendant in order that she may not be able to identify them. At approximately 4:20 A.M. on March 13, 1979, Kathy Tolin, 5 feet tall, 115 pounds, was confronted by Gregory Scott Engle, in the company of Rufus E. Stevens, with a large pocketknife, at which time she turned over the contents of the cash register to Engle, determined later to be $67.00. She was forcibly removed from the Majik Market and placed in a car owned by Rufus Stevens; at which time she was driven to a secluded wooded area nearby and both men raped her. She was then taken to an area approximately 200 feet deeper into the woods where a rope was placed around her neck and she was strangled. Then the large pocketknife was plunged into her back and her vagina was mutilated by a man's hand or a bottle. Either the rope around her neck or the knife wounds could have killed her. The four-inch tear inside the vagina was inflicted as she was dying. Her body was dragged, face down, into the underbrush almost causing one side of her face to be unrecognizable.
>
> Both defendants returned home around 7:00 A.M., March 13, 1979, and the body of Kathy Tolin was found by two boys around 10:00 A.M. on March 14, 1979.

We address appellant's points on appeal in the order in which they were raised.

Appellant first argues that the excusal of two prospective jurors who voiced objections to the death penalty denied him his right to be tried by an impartial jury drawn from a representative cross-section of the community. He contends that the excusals do not comply with the United States Supreme Court's ruling in *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), in which the Court stated:

> [A] sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction.

*Id.* at 522, 88 S.Ct. at 1777. In the footnote to the above, however, the Court added the following caveat:

> We repeat, however, that nothing we say today bears upon the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt*.

*Id.* at 522–23 n. 21, 88 S.Ct. at 1777 n. 21.

[1] This Court has likewise held that one who "would vote against death regardless of the facts presented or the instructions given" may properly be excused from service on a jury. *Jackson v. State*, 366 So.2d 752, 755 (Fla.1978), *cert. denied*, 444 U.S. 885, 100 S.Ct. 177, 62 L.Ed.2d 115 (1979). We have also approved the excusal of a prospective juror who testified that he "could not return an advisory sentence of death upon the weighing of extenuating and mitigating factors of the crime as required by section 921.141(2), Florida Statutes...." *Witt v. State*, 342 So.2d 497, 499 (Fla.), *cert. denied*, 434 U.S. 935, 98 S.Ct. 422, 54 L.Ed.2d 294 (1977).

In light of the foregoing, we find that the exclusions here complained of by appellant were warranted and proper. During voir dire, one of the two jurors excused testified, in part, as follows:

> Q. (prosecuting attorney): [C]ould you under any circumstances, regardless of the proof or how strong it is, vote to send the man to the electric chair?
>
> A. I would not vote to send a man to the electric chair.

The same prospective juror was later questioned by the court:

> Q. (the court): Would you ever vote to impose the death penalty under any circumstances?
>
> A. At this point, I would say no.
>
> Q. Would you refuse to consider imposition of the death penalty in the case we are now about to try, even if he is found guilty by the jury? Would you refuse to consider the death penalty?
>
> A. Yes.

The second excluded juror testified, in part, as follows:

> Q. (the court): If he was convicted of murder in the first degree and the second phase of the proceeding in which the jury would listen to mitigating and aggravating circumstances, would you under those circumstances participate in a vote recommending the death penalty?
>
> A. I would not participate in recommending the death penalty.
>
> Q. By that, you mean you would not vote for the death penalty?
>
> A. I would not vote for the death penalty.
>
> Q. Under no circumstances?
>
> A. No.
>
> Q. No matter what the circumstances were, you would not vote for the death penalty.
>
> A. I don't think I would.

[2] The responses above demonstrate that both of the excused jurors had more

than "general objections to the death penalty." Both admitted that they would refuse to vote for the death penalty regardless of the facts or the circumstances, and one who demonstrates an irrevocable commitment to so vote may properly be dismissed. The trial court did not violate the strictures of *Witherspoon*.

Appellant's second point on appeal is that he was denied his due process and fair trial rights when the trial court allowed the jurors to separate during their deliberations over his guilt and go to their homes for the evening. He claims that the error was compounded by the alleged failure to reconvene the jury in the courtroom the next morning prior to its retiring for further deliberations.

Appellant cites as controlling our decision in *Raines v. State*, 65 So.2d 558 (Fla.1953), in which we reversed a conviction because the trial court had recessed the jury and sent it home for the evening one and one-half hours after the start of guilt deliberations. In holding that the error warranted reversal, we noted, in part:

> There was no objection raised when the jury was dispersed, nor were counsel consulted. There is no showing in the way of evidence that defendant's rights were prejudiced but trials should not be conducted in a way that defendant has good reason for the belief that he was deprived of fundamental rights. The opportunity was open for tampering with the jury and the temptation to do so was such that we are not convinced that the appellant's trial was conducted with that degree of fairness and security that the bill of rights contemplates. A fifteen hours absence under no restraint whatever leaves too much room to question the bona fides of everything that took place during that time, particularly when one defendant was acquitted and the other was convicted on the same charge and evidence.

*Id.* at 559–60.

[3] The facts in the case *sub judice* are, however, distinguishable from those in *Raines*. Counsel here *were* consulted; in fact, the record shows that appellant's counsel agreed to the separation. Furthermore, prior to their separation for the evening, the trial judge admonished the jury to neither discuss the case with outsiders, nor read, watch, or listen to any media reports thereon. Unlike in *Raines*, we are here convinced that appellant's trial was conducted with that degree of fairness and security that the bill of rights contemplates, and do not believe that he has good reason to believe that he was deprived of any fundamental rights.

[4] Rule 3.370(b), Florida Rules of Criminal Procedure, provides that unless a jury has been kept together during trial, the court may, after final submission of the cause, allow the jurors to separate and then reconvene. As the jury here was not sequestered during trial, mere separation did not violate said rule.

[5] Appellant argues, however, that the record shows that the jury did not reconvene in the courtroom before retiring for the second time, as is required by rule 3.370(b). The pertinent portion of the transcript states the following:

> Whereupon, at 8:30 o'clock a.m., the jury returned to the jury room to further consider their verdict.

Appellant contends that the lack of any indication in the record of the jury having reconvened proves that such did not occur.

Normal procedure in a trial like appellant's would be for the judge to have assembled and ascertained the presence of all of the jurors the morning after the separation, and then to have allowed them to retire once again. Appellant asks that we assume the unusual and presume that the trial judge did not follow the normal pattern. In the absence of more persuasive evidence than that offered, we decline to do so.

It is just as logical to conclude that the jury did reconvene, or else the court reporter would have had no way of knowing that they retired to the jury room at 8:30 a.m. That, and the absence of any objection by appellant's counsel, casts doubt upon the assertion that the jurors were not reconvened. If such error occurred, counsel

should have noted it for the record and lodged an objection.

Appellant also contends, in relation to the separation of the jury, that section 918.06, Florida Statutes (1979), was violated. That section provides, in part:

> If the court permits the jurors to separate, it shall admonish them not to view the place where the offense appears to have been committed.

Since the jury was not so admonished immediately prior to its separation during deliberations, the court committed error requiring a new trial, argues appellant.

[6] The jury was, however, admonished not to view the scene of the crime. On the first day of the trial, prior to recessing for the evening, the judge lectured the jury regarding its role, communication with persons outside the court, and the like. Among the instructions that he gave was the following:

> You must not visit the scene of the alleged crime. Should that be necessary, we will go as a group under the supervision of the Court.

Appellant contends that the preceding admonition, given three days prior to the separation of the jury during deliberations, was insufficient compliance with the statute.

We do not think, however, that the statute mandates that such an instruction be given every time that the jury separates. The judge not only complied with the letter of the law but, in our opinion, also accomplished its purpose. We are confident that in a trial of as short a duration as this one, the jury is capable of remembering and heeding the judge's admonition not to visit the scene of the alleged crime without the necessity of repeating the same every time that the jury separates.

Appellant's third point on appeal is that the trial court erred by admitting into evidence, over objection, three photographs of the victim. Appellant contends that certain of the photos were unnecessary in that prior testimony had already established that which the photos depicted, that they were enlarged and in color in order to inflame the jury, and that there existed black and white photos taken under the medical examiner's supervision which would have served the same purpose.

[7-9] The test for the admissibility of photographic evidence is relevance; a relevant photograph is admissible. The photographs were used to corroborate and aid in the description of the testimony of certain witnesses and, as such, were relevant. The color photos appear to have been especially useful in showing the drag marks on the victim's body. It is immaterial that there was no dispute regarding the occurrence of the crime or the cause of death because "[a] defendant cannot, by stipulating as to the identity of a victim and the cause of death, relieve the State of its burden of proof beyond a reasonable doubt." *Foster v. State*, 369 So.2d 928, 930 (Fla.), *cert. denied*, 444 U.S. 885, 100 S.Ct. 178, 62 L.Ed.2d 116 (1979).

[10] Nor do we find the introduction of color rather than black and white photographs to be error. The state is not limited to the use of black and white photos, and is free to select from among the permissible choices those photographs which it wishes to use. In certain situations color may be the preferable choice, as here where the drag marks on the victim's body were not visible in a black and white photo. We are likewise undisturbed by the size of the photographs, as they were not unreasonably enlarged.

[11] Appellant's fourth point on appeal is that the trial court erred in responding to the jury's question, posed during the guilt deliberation phase of the trial, of whether in order to justify a first degree murder conviction the jury had to be convinced that the defendant killed the victim. The judge answered by reinstructing the jury on murder in the first degree, murder in the second degree, and the law of principals. Appellant, relying on our decisions in *Hedges v. State*, 172 So.2d 824 (Fla.1965), and *Castor v. State*, 365 So.2d 701 (Fla.1978), contends that the judge ought to have rein-

structed the jury on all degrees of homicide, including manslaughter, and should have included instructions on justifiable and excusable homicide. We, however, do not agree.

In *Hedges*, prior to the jury retiring the judge provided instructions on all degrees of unlawful homicide and on justifiable and excusable homicide. During its deliberations, the jury asked the court to "go over the different degrees that were stated the other day. There is some confusion as to the different charges here." 172 So.2d at 825. The court repeated the instructions on unlawful homicide alone, refusing to reinstruct on justifiable and excusable homicide, and we reversed, observing:

> In Tipton we held that the manslaughter statute . . . necessarily requires a definition of excusable homicide as an essential of a complete charge.
>
> . . . .
>
> [I]n order to supply a complete definition of manslaughter as a degree of unlawful homicide it is necessary to include also a definition of the exclusions. [i.e. justifiable and excusable homicide]
>
> . . . .
>
> [T]he instant problem arose when the trial judge repeated—at jury request—his instructions on degrees of homicide. It is proper for a judge to limit the repetition to the charges requested. However, the repeated charges should be complete on the subject involved. The giving of a partial instruction fails to inform the jury fully and often leads to undue emphasis on the part given as against the part omitted.
>
> . . . .
>
> In the instant case when the judge repeated his charges on degrees of homicide he should have included the requested definitions of justifiable and excusable homicide. Failure to do so erroneously left with the jury an incomplete, and, potentially misleading instruction.

172 So.2d at 825–26 (citations omitted).

In the case *sub judice*, however, the judge was not asked to review the different degrees of homicide. He was asked a question regarding the elements requisite for a first-degree murder conviction, and when the question posed is that narrow and specific, the judge may limit the repetition to the charges requested. The judge here, evidently because the jury was confused regarding the degrees of murder and how active a role is required in order to be held liable therefor, provided reinstructions on first and second-degree murder and on the law of principals. We are of the opinion that the repeated charges were "complete on the subject involved." 172 So.2d at 826.

More on point than *Hedges* is our decision in *Henry v. State*, 359 So.2d 864 (Fla.1978). In *Henry*, at the conclusion of a murder trial, the jury was instructed on first-degree murder, attempted first-degree murder, second-degree murder, third-degree murder, attempted third-degree murder, manslaughter, justifiable homicide, and excusable homicide.

During its deliberations, the jury in *Henry* sent the judge a note stating, in part:

> We do have a problem understanding the difference in murder in the first degree and murder in the second degree. In other words, can this be clarified?

359 So.2d at 865.

In response to the above, the judge reinstructed the jury on first and second-degree murder. The defendant appealed the resulting concurrent life terms to the district court of appeal, contending that the limited reinstruction was an error and that the trial court should have reinstructed the jury on all degrees of unlawful homicide and on justifiable and excusable homicide. The district court affirmed the trial court, and certified to this Court the following question:

> WHETHER A TRIAL COURT MUST REINSTRUCT THE JURY UPON ALL DEGREES OF HOMICIDE AND/OR UPON JUSTIFIABLE AND EXCUSABLE HOMICIDE UPON TIMELY REQUEST THEREFOR WHERE THE COURT REINSTRUCTS UPON FIRST AND SECOND DEGREE MURDER AFTER A REQUEST BY THE JURY TO

CLARIFY THE "DIFFERENCE IN MURDER IN THE FIRST DEGREE AND MURDER IN THE SECOND DEGREE"?

359 So.2d at 865–66.

We answered the question in the negative and approved the district court's decision, noting the following regarding limited reinstructions:

> In *Hysler v. State*, 85 Fla. 153, 95 So. 573 (1923), this Court established the principle that it is proper for a judge to limit the repetition of the charges to those specially requested as any additional instruction might needlessly protract the proceedings. We echoed this principle in *Hedges v. State*, 172 So.2d 824 (Fla.1965), but added the caveat that the repeated charges should be complete on the subject involved.
>
> . . . .
>
> We can find no abuse of discretion in limiting reinstruction to a direct response to the jury's specific request. Indeed, to do otherwise might not only create confusion in the minds of the jurors but might give the appearance of placing the trial judge in the role of an interested advocate rather than an impartial arbiter. We also note that requiring the court to repeat all of its original instructions whenever the jury requests additional instructions upon a particular point would be both exhausting and time-consuming to the court, the jury, and the parties. The result might be a jury which is deterred from requesting and a court which is restrained from giving, supplemental instructions to help clarify a particular issue.

359 So.2d at 866–67 (citations omitted).

We then distinguished the situation in *Henry* from that in *Hedges*, explaining why limited instructions were sufficient in the former and not in the latter:

> [T]he specific holding in *Hedges* was that where a jury specifically requests reinstruction on the "different degrees" of the charges levied, and, accordingly, the court reinstructs on manslaughter and the other degrees of unlawful homicide, the court is then compelled to reinstruct on excusable and justifiable homicide as a necessary concomitant of manslaughter. The jury in *Hedges* was given an incomplete instruction with regard to manslaughter. In the instant case, the jury was not reinstructed on manslaughter but was recharged exclusively on first and second degree murder. When the initial jury instruction on manslaughter was given, so were the charges on justifiable and excusable homicide. Consequently, petitioner's reliance upon *Hedges v. State*, supra, is misplaced.
>
> Petitioner's argument that the jury's understanding of any "unlawful killing" must necessarily depend on its comprehension of "lawful killings" is persuasive. It is obvious that before the defendant can be convicted of any unlawful killing, the jury must conclude that the homicide was not lawful. However, in the case *sub judice*, it is apparent that the jury had already made that determination by requesting merely a clarification of the "difference" between first and second degree murder. Had they not determined whether the homicide was lawful or unlawful, they would have solicited reinstructions on justifiable and excusable homicide or the other degrees of unlawful homicide, or both. We can contemplate numerous situations where the jury's request does not suggest necessarily that they have already determined whether a homicide has been lawful or unlawful. In those situations, the defendant is entitled to reinstructions on lawful homicide.

359 So.2d at 867–68 (citation and footnotes omitted).

In the case *sub judice*, as in *Henry*, the jury's request for clarification was a narrow one, so the court was not compelled to repeat the entire set of instructions initially given. The reinstruction given was proper in view of our rulings in *Hedges* and *Henry*.

[12] Appellant's next point on appeal is that he was denied the due process of law guaranteed by the constitutions of Florida and the United States by the submission to the jury of misleading written instructions.

The instructions, those in section 2.13(i) of the Florida Standard Jury Instructions in Criminal Cases, Second Edition, instruct the jury on the weight to be given out-of-court statements made by a defendant. The printed instructions contain the words "statement," "admission," and "confession," intending that the applicable term be utilized. When the judge read the above instructions, he, at the request of appellant's counsel, used the word "statement" rather than "admission" or "confession," wherever a choice was given. But, when he gave the jury a copy of the instructions for use during deliberations, he did not in any way delete or cover the alternative words "admission" and "confession" which are printed in parentheses following "statement." Appellant contends that such constituted fundamental, reversible error. We disagree.

The trial court gave, orally, the proper standard jury instruction on the subject. The printed instruction given the jury read the same except for the parenthetical words previously noted. While it might have been preferable for the words in parentheses to have been deleted, we do not think that their presence was so misleading to the jury as to fatally flaw the instructions.

The weight which the instructions direct that an out-of-court statement be given is the same regardless of which of the three words is inserted. The presence of the parenthetical alternatives should not have interfered with the jury's understanding and analysis of the evidence.

Appellant notes that the importance of *not* using the word "confession" indiscriminately is shown by the caveat, cautioning against such, located at the bottom of the printed instructions. While he is correct, we note that the jury, if it utilized the printed instruction, would likewise have seen that caveat and thus been warned against automatic, unthinking use of the word "confession".

In addition to the foregoing, we note that appellant's trial counsel *never* requested that the words "admission" and "confession" be deleted from the printed instructions and made no objection when the same were submitted to the jury. In fact, the issue was never raised until the cause was appealed. As appellee points out, "except in the rare cases of fundamental error . . . appellate counsel must be bound by the acts of trial counsel." *Castor*, 365 So.2d at 703 (footnote omitted). The failure to delete the two words complained of from the printed instructions simply does not constitute fundamental error and is not grounds for reversal and a new trial.

[13] Appellant's sixth point on appeal is that the trial court erred by rejecting the jury's recommendation of life imprisonment and instead imposing the death penalty. We note at the outset the error of appellant's contention that a sentence of death imposed by a trial court after a jury recommendation of life imprisonment constitutes double jeopardy. We held to the contrary in *Douglas v. State*, 373 So.2d 895 (Fla. 1979). *See also Phippen v. State*, 389 So.2d 991 (Fla.1980).

[14] As to the propriety of the judge's failure to follow the jury's sentence recommendation, "[i]n order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." *Tedder v. State*, 322 So.2d 908, 910 (Fla. 1975). The trial judge found four aggravating circumstances, to wit: that the murder was committed after appellant had engaged in a kidnapping and rape, that it was committed to avoid a lawful arrest, that it was committed for pecuniary gain, and that it was especially heinous, atrocious, and cruel. He found no mitigating circumstances. Review of the record demonstrates the validity and propriety of the above findings.

[15] Appellant contends, with regard to said findings, that the judge committed several errors. First, he contends that the judge "manifestly overlooked and failed to consider" any nonstatutory mitigating circumstances. It appears from the record, however, that the trial judge did consider such and simply found that none existed.

[16–19] Appellant also asserts that his due process rights were violated when the appellee was permitted to argue before the trial judge at sentencing for the applicability of two aggravating factors that had not been argued before the jury. He contends that he should be allowed "to have the existence and validity of aggravating circumstances determined as they were placed before his jury." The trial judge, however, is not limited in sentencing to consideration of only that material put before the jury, is not bound by the jury's recommendation, and is given final authority to determine the appropriate sentence. Prior cases make it clear that during sentencing, evidence may be presented as to any matters deemed relevant, *see, e.g., Alvord v. State*, 322 So.2d 533 (Fla.1975), *cert. denied*, 428 U.S. 923, 96 S.Ct. 3234, 49 L.Ed.2d 1226 (1976), and that a trial judge may consider information, such as presentence and psychological reports, which were not considered by the jury during its sentencing deliberations. *Swan v. State*, 322 So.2d 485 (Fla.1975). Furthermore, the record indicates that the trial judge ordered the presentence investigation report on appellant, after the jury's recommendation had been received, at the request of appellant's trial counsel. Use of said information, with counsel being apprised thereof, was not improper and did not violate *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977).

[20] Appellant's last point on appeal is that the trial court erred by considering during sentencing evidence that was not introduced during the guilt determination phase of his trial. Specifically, he refers to information obtained from confessions and statements made by Rufus Stevens, who was found guilty at a separate trial of the same murder as appellant. Consideration, in sentencing appellant, of a confession admitted at Stevens' trial unconstitutionally denies appellant an opportunity to cross-examine and confront Stevens, contends appellant. He further asserts that the judge was not only aware of, but also considered the "inadmissible evidence". *See Alford v. State*, 355 So.2d 108 (Fla.1977), *cert. denied*, 436 U.S. 935, 98 S.Ct. 2835, 56 L.Ed.2d 778 (1978).

Appellant cites *Specht v. Patterson*, 386 U.S. 605, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967), and *Gardner v. Florida*, for the proposition that the "right of confrontation protected by cross-examination is a right that has been applied to the sentencing process." *Specht* held unconstitutional Colorado's sex offender statute which allowed a critical finding to be made without a hearing and on the basis of hearsay evidence to which the defendant had no access. The Court reasoned:

> Under Colorado's criminal procedure, here challenged, the invocation of the Sex Offenders Act means the making of a new charge leading to criminal punishment. The case is not unlike those under recidivist statutes where an habitual criminal issue is "a distinct issue" on which a defendant "must receive reasonable notice and an opportunity to be heard." Due process, in other words, requires that he be present with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine, and to offer evidence of his own.... None of these procedural safeguards we have mentioned is present under Colorado's Sex Offenders Act. We therefore hold that it is deficient in due process as measured by the requirements of the Fourteenth Amendment.

386 U.S. at 610–11, 87 S.Ct. at 1212–13 (citations omitted).

[21] The requirements of due process of law apply to all three phases of a capital case in the trial court: 1) The trial in which the guilt or innocence of the defendant is determined; 2) the penalty phase before the jury; and 3) the final sentencing process by the judge. *Presnell v. Georgia*, 439 U.S. 14, 99 S.Ct. 235, 58 L.Ed.2d 207 (1978); *Gardner v. Florida*; *Green v. Georgia*, 442 U.S. 95, 99 S.Ct. 2150, 60 L.Ed.2d 738 (1979). Although defendant has no substantive right to a particular sentence within the range authorized by statute, sentencing is a critical stage of the criminal proceeding.

[22, 23] The sixth amendment right of an accused to confront the witnesses against him is a fundamental right which is made obligatory on the states by the due process of law clause of the fourteenth amendment to the United States Constitution. *Pointer v. Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). The primary interest secured by, and the major reason underlying the confrontation clause, is the right of cross-examination. *Pointer v. Texas*. This right of confrontation protected by cross-examination is a right that has been applied to the sentencing process. *Specht v. Patterson*.

[24] In *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), it was held that a statement or confession of a co-defendant which implicates an accused is not admissible against the accused unless he has an opportunity to confront and cross-examine the co-defendant. To admit such a statement is unquestioned error. In *Hall v. State*, 381 So.2d 683 (Fla.1979), we held that statements or confessions made by a co-defendant are inadmissible as evidence against defendant at the guilt phase of the trial.

The record shows that the trial judge was not only made aware of this inadmissible evidence but he did, in fact, consider it. Thus, the distinction made by this Court in *Alford v. State* is not applicable.

[25] The consideration of the confession or statement of a co-defendant is quite different from the consideration of a presentence report. If the defendant disputes the truth of a presentence report, he has the right to secure confrontation and cross-examination if he wishes to do so. *See Eutsey v. State*, 383 So.2d 219 (Fla.1980). On the other hand, a defendant cannot require a co-defendant to waive his constitutional right to remain silent and force him to testify during the sentencing procedure.

The conviction of defendant is affirmed, but sentence is vacated and the cause is remanded with instructions to conduct another sentence hearing. It will not be necessary to empanel another jury.

It is so ordered.

ADKINS, OVERTON, McDONALD and EHRLICH, JJ., concur.

ALDERMAN, C.J., concurs in part and dissents in part with an opinion, in which BOYD, J., concurs.

ALDERMAN, Chief Justice, concurring in part, dissenting in part.

I concur with the affirmance of Engle's conviction. I dissent, however, to the reversal and remand of his death sentence on the basis that Engle was denied his sixth amendment right to confront a witness during the sentencing phase of his trial. Engle argues that he was deprived of this constitutional right because the trial court, during the sentencing phase, considered a confession admitted at Stevens' trial and denied him an opportunity to cross-examine and confront Stevens. This information was furnished to defendant and his counsel for rebuttal purposes pursuant to *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). The only question is whether the trial judge should have considered the information without permitting cross-examination of the codefendant.

In reaching the decision that the due process requirement regarding confrontation of a witness required this cross-examination during the sentencing phase of Engle's case, the majority opinion relies primarily on *Specht v. Patterson*, 386 U.S. 605, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967); and *Gardner v. Florida*. These decisions, however, do not compel the conclusion reached by the majority.

*Specht* is distinguishable on its facts and, as the Court stated in its opinion, deals with a "radically different situation." 386 U.S. at 608, 87 S.Ct. at 1211. In *Specht* the Court was confronted with a sentencing procedure involving Colorado's Sex Offenders Act. The Court found that sentencing Specht under the Sex Offenders Act rather than the statute for which he was convicted actually resulted in "the making of a new

*charge* leading to criminal punishment." *Id.* at 610, 87 S.Ct. at 1212 (emphasis added). In reaching its decision that this introduction of what constituted a new charge at the sentencing phase violated the defendant's due process rights, the Court made it clear that it was not receding from its holding in *Williams v. New York*, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949).

> The Court in *Williams* specifically stated:
> The due-process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure. So to treat the due-process clause would hinder if not preclude all courts—state and federal—from making progressive efforts to improve the administration of criminal justice.

337 U.S. at 251, 69 S.Ct. at 1085. In applying this rationale to a death penalty case, the Court held that it *could not* find that "the due-process clause renders a sentence void merely because a judge gets additional out-of-court information to assist him in the exercise of this awesome power of imposing the death sentence." *Id.* at 252, 69 S.Ct. at 1085. The decision of the Supreme Court of the United States in *Williams*, holding that due process does not require that a defendant be allowed to confront and cross-examine witnesses testifying at his sentencing proceeding, is controlling in the present case.

*Gardner v. Florida* does not compel reversal of the death sentence. Under the facts of the present case, Engle's counsel was apprised of all information upon which the trial judge relied in sentencing Engle and was given full opportunity to deny or explain this information.

Accordingly, I would find no due process violation, and I would affirm both the conviction and the sentence of death.

BOYD, J., concurs.

**DEPARTMENT OF INSURANCE, State of Florida, et al., Appellants,**

**v.**

**SOUTHEAST VOLUSIA HOSPITAL DISTRICT, et al., Appellees.**

**FLORIDA PATIENT'S COMPENSATION FUND, et al., Appellants,**

**v.**

**SOUTHEAST VOLUSIA HOSPITAL DISTRICT, et al., Appellees.**

**Nos. 63698, 63699 and 63751.**

Supreme Court of Florida.

Sept. 15, 1983.

Rehearing Denied Nov. 4, 1983.

Hospitals appealed from final order of the Department of Insurance levying assessment against them in Patient's Compensation Fund. The District Court of Appeal, 432 So.2d 592, reversed and remanded, and an appeal was taken. The Supreme Court, Adkins, J., held that statute providing for financing of Patient's Compensation Fund, which was established to pay medical malpractice claims against participating health care providers over and above certain limits, is constitutional.

Reversed.

**1. Constitutional Law ⇐62(2)**

Crucial test in determining whether a statute amounts to an unlawful delegation of legislative power is whether the statute contains sufficient standards or guidelines to enable the agency and the courts to determine whether the agency is carrying out the legislature's intent.

**2. Hospitals ⇐3**
**Physicians and Surgeons ⇐2**

Section of statute providing for financing of Patient's Compensation Fund, which was established to pay medical malpractice

IN THE SUPREME COURT OF FLORIDA

| | | |
|---|---|---|
| GREGORY SCOTT ENGLE, | : | |
| Appellant, | : | |
| vs. | : | CASE NO. 57,708 |
| STATE OF FLORIDA, | : | |
| Appellee. | : | |
| | : | |

MOTION FOR REHEARING

Appellant, GREGORY SCOTT ENGLE, pursuant to Rule 9.330(a) of the Florida Rules of Appellate Procedure, hereby moves this Court for rehearing in the above-styled case, and as grounds therefor states:

1. In its opinion filed September 15, 1983, this Court rejected appellant's argument that the excusal for cause of prospective jurors Ruis and Young violated the principles of Witherspoon v. Illinois, 391 U.S. 510 (1968). Mr. Ruis testified, in part:

> MR. AUSTIN [prosecutor]: [C]ould you under any circumstances, regardless of the proof or how strong it is, vote to send the man to the electric chair?
>
> MR. RUIS: I would not vote to send a man to the electric chair.
>
> (T.169)
>
> * * * * * *
>
> THE COURT: Would you ever vote to impose the death penalty under any circumstances?
>
> MR. RUIS: At this point, I would say no.
>
> THE COURT: Would you refuse to consider imposition of the death penalty in the case we are now about to try, even if he is found guilty by the jury? Would you refuse to consider the death penalty?
>
> MR. RUIS: Yes.
>
> (T.181-82)

The trial court asked to see counsel at sidebar (T.182). With reference to a challenge for cause, the court said "Well, I'd like to know what the Federal Courts have to say about

this." (T.182). When the trial court indicated that he was inclined to grant the state's challenge for cause, defense counsel requested permission to further question Mr. Ruis to ascertain whether he could follow the law as instructed (T.184). The prosecutor objected to any further inquiry, stating "...at this point he [defense counsel] can get up there and couch the question" (T.185). The trial court then excused Mr. Ruis for cause without any further inquiry (T.187).

Miss Young testified, in part:

> THE COURT: If he was convicted of murder in the first degree and the second phase of the proceeding in which the jury would listen to mitigating and aggravating circumstances, would you under those circumstances participate in a vote recommending the death penalty?
>
> MISS YOUNG: I would not participate in recommending the death penalty.
>
> THE COURT: By that, you mean you would not vote for the death penalty?
>
> MISS YOUNG: I would not vote for the death penalty.
>
> THE COURT: Under no circumstances?
>
> MISS YOUNG: No.
>
> THE COURT: No matter what the circumstances were, you would not vote for the death penalty.
>
> MISS YOUNG: I don't think I would.
>
> (T.207)

Upon further questioning by defense counsel, Miss Young stated that she could weigh the evidence and the aggravating and mitigating circumstances and abide by the law according to the judge's instructions (T.208-09). Then, upon further questioning by the prosecutor, Miss Young testified:

> MR. AUSTIN: ...If this defendant is guilty, you are going to be called upon to vote if you find that he is guilty, you are going to be called upon to vote whether to put him in the electric chair or not, to make that recommendation. Could you under any circumstances cast a vote that would put him in the electric chair?
>
> MISS YOUNG: No.
>
> THE COURT: You could not or could you?
>
> MISS YOUNG: No.

THE COURT: Well, answer the question. You are nodding your head.

MISS YOUNG: All right. I could not vote. Okay. You asked once, you asked me if I could follow the letter of the law. I could but I'm opposed to the death penalty and I don't think I would be able to recommend that.

MR. AUSTIN: Could you, under any circumstances recommend that that man be found guilty of murder and go to the electric chair, could you under any circumstances, in view of your belief against the death penalty, which you have a perfect right to have? Could you under any circumstances vote to put him in the electric chair and recommend death?

MISS YOUNG: I don't think so.

MR. AUSTIN: Under any circumstances, you could not, could you?

MISS YOUNG: No, sir.

(T.210)

Over defense objection, the trial court excused Miss Young for cause (T.211-12).

2. In affirming the trial court's rulings, this Court cited to its prior decision in Witt v. State, 342 So.2d 497, 499 (Fla. 1977). In that case, the Court said:

> Appellant Witt contends it was error to exclude for cause prospective jurors who held objections to capital punishment. During voir dire the trial court excluded six prospective jurors who stated they could not return an advisory sentence of death upon the weighing of extenuating and mitigating factors of the crime as required by Section 921.141(2), Florida Statutes, or stated they could not judge the guilt or innocence of the accused without the possible imposition of the death penalty interfering with that determination. It is proper to exclude prospective jurors who "state that their reservations about capital punishment would prevent them from making an impartial decision as to the defendant's guilt. ... [or] who say that they could never vote to impose the death penalty or that they would refuse even to consider its imposition in the case before them." Witherspoon v. Illinois, 391 U.S. 510, 513-14, 88 S.Ct. 1770, 1772, 20 L.Ed.2d 776 (1968) (footnote omitted). The statements of the jurors in the instant case constitutionally warranted their exclusion. See, e.g., Portee v. State, 253 So.2d 866 (Fla. 1971).
>
> Witt v. State, supra, at 499.

3. Appellant believes that this Court, in its analysis of the Witherspoon issue in the instant case, necessarily failed to consider the effect of the decision in Witt v. Wainwright, __ F.2d__ (11th Cir. 1983) (case no. 81-5750), which was issued on September 16, 1983, one day after the instant opinion was released. The Eleventh Circuit in Witt v. Wainwright held that the excusal for cause of a prospective juror who expressed general opposition to the death penalty and indicated that she thought that it would interfere with her determination of guilt or innocence was error of a constitutional dimension, where the juror never unequivocally stated that she would automatically be unable to apply the death penalty or to find the defendant guilty if the facts so indicated. Witt v. Wainwright, supra, discusses the proper application of Witherspoon as follows:

> In Witherspoon, the Supreme Court acknowledged that a capital defendant's right to an impartial jury under the Sixth and Fourteenth Amendments is jeopardized by the removal of jurors who merely express their distaste for or philosophical opposition to the death penalty. A jury constituted of only those remaining after such excusals would be a jury "uncommonly willing to condemn a man to die." Witherspoon, 391 U.S. at 521, 88 S.Ct. at 1776. Yet the Court recognized the necessity of excusing for cause those prospective jurors who, because of their lack of impartiality from holding unusually strong views against the death penalty, would frustrate a state's legitimate effort to administer an otherwise constitutionally valid death penalty scheme. The Court resolved these conflicting principles by permitting a state to:
>
> > execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt.
>
> Witherspoon, 391 U.S. at 522, n. 21, 88 S.Ct. at 1777, n. 21....
>
> The Court, in explaining this test, has indicated a prospective juror must be

> permitted great leeway in expressing opposition to the death penalty before he or she qualifies for dismissal for cause. A prospective juror may even concede that his or her feelings about the death penalty would possibly color an objective determination of the facts of a case without admitting of the necessary partiality to justify excusal.
>
> Witt v. Wainwright, supra, (slip opinion at 4804-05) (emphasis supplied)

4. With regard to the "great leeway" a prospective juror must be permitted in expressing opposition to the death penalty before he or she may constitutionally be excused for cause, it is disturbing to note the apparent double standard applied to the opposing attorneys in their efforts to elicit responses from the prospective jurors which would demonstrate their ability or inability to follow the law and the trial court's instructions in making a recommendation as to penalty. In the case of Mr. Ruis, who had clearly stated that he could vote to find a defendant guilty even with the knowledge that he might be sentenced to death (T.169,181), and that he could fairly weigh the evidence in both portions of the case (T.172), but also indicated that at this point he would say that he would not vote to impose the death penalty under any circumstances, defense counsel was not permitted to make further inquiry of the juror as to whether he could follow the law as instructed by the court and weigh the aggravating and mitigating circumstances before reaching an irrevocable decision as to penalty, or whether he could envision that at some point, under some conceivable set of circumstances, he might consider voting for the death penalty. The prosecutor's objection to any further questioning of Mr. Ruis was that defense counsel could "couch the question" (which presumably means that defense counsel could frame the question in such a way as to hopefully elicit a response from the juror that he was not automatically and unequivocally committed to voting against the death penalty, and thus demonstrate that the juror could not constitutionally be excluded for cause under Witherspoon). In the case of Miss Young, in contrast, the juror gave several equivocal responses to the effect

of "I don't think I would" vote to impose the death penalty. The prosecutor, without any reluctance on his part to "couch the question" or to put words in the juror's mouth said:

> MR. AUSTIN: Could you, under any circumstances recommend that that man be found guilty of murder and go to the electric chair, could you under any circumstances, in view of your belief against the death penalty, which you have a perfect right to have? Could you under any circumstances vote to put him in the electric chair and recommend death?
>
> MISS YOUNG: I don't think so.
>
> MR. AUSTIN: Under any circumstances, you could not, could you?
>
> MISS YOUNG: No, sir.
>
> (T.210)

Appellant submits that, in view of the great leeway which must be accorded a prospective juror to express opposition to the death penalty before he or she can constitutionally be excused for cause, this Court should apply the reasoning of Witt v. Wainwright, supra and hold that the trial court committed reversible error in excusing prospective jurors Ruis and Young, where neither juror unequivocally stated that he or she would automatically be unable to follow the law as instructed on the question of penalty. Appellant further submits that this Court should apply the reasoning of Witt v. Wainwright, supra, and hold that the trial court erred in excusing prospective juror Ruis without affording the defense sufficient opportunity to question him as to his ability to follow the law as instructed on the question of penalty.

5. The improper exclusion of prospective jurors Ruis and Young cannot be considered "harmless," notwithstanding the fact that the jury that was ultimately selected recommended life imprisonment rather than a death sentence. First of all, a life recommendation is meaningless unless it is given effect by the trial court or by this Court. Only if this Court agrees with appellant on rehearing that his death sentence should be reduced back to life imprisonment, either on the basis of the principles set forth in Tedder v. State, 322 So.2d 908 (Fla. 1975) or

because the life override provision of Florida's death penalty statute is unconstitutional, will the Witherspoon violation be rendered harmless as to penalty. Moreover, the recent decision of the United States District Court in Grigsby v. Mabry, __F.Supp.__ (E.D.Ark. 1983)(33 Cr.L. 2477)(opinion filed August 5, 1983), which holds that the exclusion of jurors who are opposed to the death penalty but who could be fair and impartial on the question of guilt or innocence [a category which would clearly include Mr. Ruis and Miss Young even if their commitment to vote against a death sentence had been unequivocal] is violative of the Sixth Amendment, demonstrates that such improper exclusion is prejudicial error as to the guilt phase.[1] The court in Grigsby discussed the "guilt-proneness" of death-qualified juries, and stated, inter alia:

> All of petitioners' experts testified as to the relationship between death penalty attitudes and other criminal justice related attitudes. All agreed that the empirical evidence and data made it clear, in their professional opinions, that persons excluded by the process of death qualification share sets of attitudes toward the criminal justice system that set them apart and distinguish them collectively from those not excluded by that process. All were also of the opinion that death-qualified jurors are more prone to favor the prosecution, to be hostile to the defendant, to regard significant constitutional rights lightly, and to make adverse judgments concerning minority groups than persons who adamantly oppose the death penalty (i.e., are not "death qualified"). Petitioners' experts were convinced that death-qualified jurors differ systematically from those excluded under Witherspoon standards. ***
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> The Court credits and accepts the said

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[1] In his initial brief (at p. 24-25) and his reply brief (p. 1-2), appellant contended that the improper disqualification of Mr. Ruis and Miss Young entitled him to a new trial, not merely to a new penalty hearing. Appellant conceded that he was "unable, at this point, to cite a decision which would absolutely require that he be granted a new trial if it is true, as is maintained that Mr. Ruis and Miss Young were impermissibly removed for cause" (reply brief, p. 1), but noted that the question was apparently left open in Lockett v. Ohio, 438 U.S. 586, 596 (1978). The Grigsby decision was issued on August 5, 1983 and was summarized (with extensive quotation from the opinion) in the edition of the Criminal Law Reporter published September 14, 1983, the day before the opinion in the instant case was issued. Because Grigsby was so recently decided, appellant believes that, in all probability, this Court did not have the opportunity to consider its applicability to the instant case.

> opinions of petitioners' experts and finds that those opinions are based overall on solid scientific data, reason, and common sense.
>
> * * * * * *
>
> To summarize, death qualification skews the predispositional balance of the jury pool by excluding prospective jurors who unequivocally express opposition to the death penalty. The evidence, and particularly the attitudinal surveys discussed by Drs. Bronson and Hastie, clearly establishes that a juror's attitude toward the death penalty is the most powerful known predictor of his overall predisposition in a capital criminal case. That evidence shows that persons who favor the death penalty are predisposed against the defendant. The evidence shows that death penalty attitudes are highly correlated with other criminal justice attitudes. Generally, those who favor the death penalty are more likely to trust prosecutors, distrust defense counsel, to believe the state's witnesses, and to disapprove of certain of the accepted rights of defendants in criminal cases. A jury so selected will not, therefore, be composed of a cross section of the community. Rather, it will be composed of a group of persons who are uncommonly predisposed to favor the prosecution, a jury "organized to convict."
>
> [T]he Haney study provides strong empirical support for what trial lawyers and judges already know, and that is, that regardless of the preconceptions which a juror might have before entering the courtroom, the questions and the answers have a clear tendency to suggest that the defendant is guilty. Death qualification, then, is comparable to saturating the jury pool with prejudicial pretrial publicity, which, as we know, is unconstitutional. *** But the death qualification process is worse because the biasing information is transmitted to the prospective jurors inside the courtroom and is imparted, albeit unconsciously, not only by the attorneys but also by the judge.
>
> (Grigsby v. Mabry, supra, (33 Cr.L. at 2478)

The District Court in Grigsby concluded that the exclusion of persons who adamantly oppose the death penalty but could be impartial at the guilt-innocence phase is unconstitutional, and further concluded that "most of the state's legitimate interest can be accomodated by requiring completely bifurcated trials in capital cases - with one jury to determine the guilt [or] innocence of the defendant and another jury to determine the penalty if the defendant is convicted." The court observed:

> [T]he State's principal interest in preserving death qualification or the death qualification process boils down to a question of efficiency and money. The State simply does not want to pay the expense of having two separate juries, one to determine guilt and the other, if necessary, to determine penalty.
>
> If such a bifurcated system were established, would it mean that in every case in which the State sought the death penalty two separate juries would have to be impaneled? The answer is, obviously, no.
>
> Grigsby v. Mabry, supra (33 Cr.L. at 2478)

The District Court pointed out that a second jury would need to be empaneled only if the guilt phase resulted in a conviction of capital murder, and only if the state continued to seek the death penalty and to insist upon its consideration by a fully death-qualified jury, and concluded that:

> ...the state's interests in using the present death-qualification system in capital cases cannot justify its effects on guilt determinations in capital cases. Nor can such interests justify the destruction of the representativeness of the juries which result from death qualification. In sum, the respondent has failed to carry its burden of justifying the use of nonrepresentative and partial juries in the trial of the guilt or innocence of those accused of capital crimes.
>
> Grigsby v. Mabry, supra (33 Cr.L. at 2479)

The State of Florida's interest in using its present death-qualification system in capital cases is even less compelling than Arkansas'. Under Arkansas' death penalty statute, the jury must be unanimous in order to impose a death sentence; if the jury does not unanimously agree to the death sentence and to all the written findings required by the statute, the judge must impose a sentence of life imprisonment. Arkansas Criminal Code (1977) §41-1302. Consequently, imposition of the death penalty would be impossible in any case where even one juror absolutely refused to consider voting for a death sentence regardless of the evidence and the law. Yet, notwithstanding this possibility, the District Court in Grigsby held that the state must protect its interest by providing for separate juries in the two phases of a capital trial, rather than requiring the guilt or innocence

of the accused to be determined by a jury which is predisposed by the death-qualification process to find him guilty. Under Florida's death penalty statute, a death recommendation need not be unanimous, but may be returned by a majority, i.e. seven jurors. See Rose v. State, 425 So.2d 521, 525 (Fla. 1982). Thus it would take no fewer than six jurors unalterably opposed to the death penalty under any circumstances to render it impossible for the state to secure a death recommendation. Under these circumstances, if there are one or two "death-scrupled" jurors on a jury which has just convicted a defendant of first degree murder, rather than empaneling a new jury the state might well prefer to have the same jury hear the penalty phase notwithstanding the fact that there are one or two "life" votes to start out with. The prosecutor would simply be in the position of having to convince seven out of the eleven other jurors or seven out of the ten other jurors that the circumstances of the case warrant a death sentence; and that is a far less onerous burden than most states (which require that a death verdict be unanimous) impose on him at the outset. Bear in mind also that the prosecutor will have a minimum of ten peremptory challenges available to him. Fla.R.Cr.P. 3.350(a). Appellant submits that in the highly improbable event that there is any county in this state in which, even after the prosecutor has exercised his peremptory challenges, there could remain six or more people on the jury who are unalterably opposed to the death penalty under all circumstances, then unquestionably the death penalty does not comport with the conscience of that particular community and should not be imposed there in any event. See Witherspoon v. Illinois, supra, 391 U.S. at 519-20.[2]

In the light of Grigsby v. Mabry, supra, and the empirical

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[2] There is yet another peculiarity in Florida's death penalty statute, in addition to the fact that a death recommendation may be returned by a simple majority, which negates the asserted rationale for death-qualifying the jury. This is the "life-override" provision which allows the trial court to impose a death sentence even if the jury recommends life (as happened in the instant case and scores of other Florida capital cases). Thus even twelve "death-scrupled" jurors cannot block a death sentence if the judge is determined to impose it. Appellant is relegating this sub-argument to footnote status only because it is his emphatic position that "life-overrides" are unconstitutional.

studies which form the backbone of that opinion, appellant submits that this Court should reevaluate its conclusions in the instant case and hold that the exclusion for cause of prospective jurors Ruis and Young was prejudicial error requiring reversal for a new trial.

6. Appellant also believes that this Court may have misapplied the established test for determining the "reasonableness" of the jury's life recommendation (assuming arguendo that there are any circumstances under which a jury's life recommendation can constitutionally be rejected, which appellant does not concede). In its opinion, the Court wrote:

> As to the propriety of the judge's failure to follow the jury's sentence recommendation, "[i]n order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So.2d 908, 910 (Fla. 1975). The trial judge found four aggravating circumstances, to wit: that the murder was committed after appellant had engaged in a kidnapping and rape, that it was committed to avoid a lawful arrest, that it was committed for pecuniary gain, and that it was especially heinous, atrocious, and cruel. He found no mitigating circumstances. Review of the record demonstrates the validity and propriety of the above findings.
>
> Appellant contends, with regard to said findings, that the judge committed several errors. First, he contends that the judge "manifestly overlooked and failed to consider" any non-statutory mitigating circumstances. It appears from the record, however, that the trial judge did consider such and simply found that none existed.

Appellant submits that the Court approached the matter of the validity of the jury's life recommendation from the wrong vantage point. Instead of focusing on the reasonableness of the trial court's findings, the Court should have focused on the reasonableness of the jury's life recommendation; specifically, whether there was any reasonable basis for the jury to recommend life. See e.g. Shue v. State, 366 So.2d 387, 390 (Fla. 1978); Malloy v. State, 382 So.2d 1190, 1193 (Fla.

1979); Walsh v. State, 418 So.2d 1000, 1003 (Fla. 1982).

This Court has repeatedly held that a jury's recommendation of life imprisonment must be given great weight. See e.g. Tedder v. State, 322 So.2d 908, 910 (Fla. 1975); Walsh v. State, supra, at 1003; McCampbell v. State, 421 So.2d 1072 (Fla. 1982); Richardson v. State, __So.2d__ (Fla. 1983)(case no. 61,924, opinion filed September 1, 1983)(1983 FLW 327). The trial court may not override a life recommendation unless the facts justifying a death sentence are "so clear and convincing that virtually no reasonable person could differ."[3] Tedder v. State, supra, 910; see Provence v. State, 337 So.2d 783, 787 (Fla. 1976); Welty v. State, 402 So.2d 1159, 1164 (Fla. 1981); Walsh v. State, supra, at 1003. Conversely, where reasonable persons can differ over the fate of a capital defendant, it is the jury's determination, and not the judge's, which must be given effect. Provence v. State, supra, at 787. This is true even if the judge's determination is also reasonable or supported by the evidence; where there is any reasonable basis for the jury's life recommendation, the trial court is not free to substitute his own judgment to override it. See Shue v. State, supra; Malloy v. State, supra; Odom v. State, 403 So.2d 936 (Fla. 1981); Walsh v. State, supra.

The opinion in the present case upholds the trial court's override on the basis of his having found four aggravating circumstances and no mitigating circumstances. The Court rejected appellant's contention that the judge overlooked and failed to consider any non-statutory mitigating circumstances, saying "It appears from the record, however, that the trial judge did consider such and simply found that none existed." As previously discussed, however, the proper question is whether the jury could have found that some mitigating circumstance or circumstan-

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[3] And, as the Fifth Circuit Court of Appeals recognized in Spinkellink v. Wainwright, 478 F.2d 582, 605 (5th Cir. 1978), "reasonable persons can differ over the fate of every criminal defendant in every death penalty case." This illustrates appellant's position that the Tedder test is utterly unworkable and cannot pass constitutional muster as presently applied.

ces - statutory or non-statutory - existed; if so, there was a reasonable basis for its life recommendation and it must be given effect. In Welty v. State, supra, at 1164, this Court said:

> Finally, Welty argues that the trial court erred in overriding the jury recommendation of life. We agree that under the standard imposed by this Court in Tedder v. State, the court erred in imposing the sentence of death. In Tedder, we said: "In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." 322 So.2d at 910. Under the circumstances of this case, we believe that reasonable persons could differ. Although the trial court found no mitigating factors, there was evidence introduced by Welty relative to nonstatutory mitigating factors which could have influenced the jury to return a life recommendation. In light of the jury recommendation of life, we find that the sentence of death was inappropriate in this case. See also Neary v. State, 384 So.2d 881 (Fla. 1980); Malloy v. State, 382 So.2d 1190 (Fla. 1979); Brown v. State, 367 So.2d 616 (Fla. 1979); Shue v. State 366 So.2d 387 (Fla. 1978).

It is important to note that the trial court in Welty found six aggravating circumstances. This Court concluded that several of these findings were improperly "doubled", but found four valid aggravating circumstances - great risk of death to many persons, murder committed in the course of a burglary, murder committed to avoid lawful arrest, and especially heinous, atrocious, or cruel. [The aggravating circumstances found in the instant case were 1) murder committed after engaging kidnapping and rape, 2) murder committed to avoid lawful arrest, 3) pecuniary gain, and 4) especially heinous, atrocious, or cruel]. The trial judge in Welty, as in the instant case, found no mitigating circumstances. See also Richardson v. State, supra (trial court found six aggravating factors, four of which were upheld by this Court, and no mitigating factors; case remanded for imposition of life sentence in accordance with jury's life recommendation). This Court's decision in Welty turned not on whether the trial judge

found any mitigating circumstances, but on whether the jury could have found any. The same analysis should have been applied in the instant case, and would have compelled reversal of appellant's death sentence.

There were unquestionably mitigating circumstances which the jury might have found. Neither side presented any new evidence in the penalty phase, but chose to rely on the evidence presented in the guilt phase. In his argument to the jury, the prosecutor virtually conceded that the jury could consider the statutory mitigating circumstance of no significant history of prior criminal activity [Fla. Stat. §921.141 (6)(a)] in appellant's favor (T.995). Defense counsel argued, based on the evidence at trial, that the evidence against him was circumstantial and weak (T.1004-05; 1007; 1021); that there was no evidence of what participation he had in the offense, if any, after going to the robbery (T-1008; 1021-1022); that from the evidence, length of deliberations, and questions during deliberations, that the jury had found him guilty as an accessory and accomplice to Rufus Stevens (T-1004-1005; 1007-1009; 1010; 1013-1014; 1016-1017; 1022); that he did not personally take the victim's life (T-1009-1010; 1013-1014; 1017; 1019; 1022); and that, because he had been found guilty on a principal theory as an accomplice to Rufus Stevens, while the statutory aggravating circumstances argued by the appellee might apply to Rufus Stevens they did not apply to him (T-1011-1014). Defense counsel argued that appellant had no significant history of prior criminal activity (T.1014); that he was an accomplice, not a killer (T.1015-1016); that he acted under the substantial domination of another person, i.e. Rufus Stevens (T.1016; see T.431;456); and that his age should be considered in mitigation (T.1017). After the jury was charged in accordance with the standard penalty phase instructions, it retired to deliberate, and returned in twenty-five minutes (T.1028, 1031) with a recommendation of life imprisonment. In other words, it took less than half an hour for anywhere from six to twelve members of a death qualified jury to conclude that a life sentence was the appropriate penalty

for appellant. For a trial or appellate court to now conclude that "no reasonable person could differ" from a death sentence stands on its head every presumption the law ordinarily follows that jurors are reasonable and follow the court's instructions. If that is not true, then who is to say that the same jury was capable of a "reasonable" verdict as to guilt or innocence? The trial court's override of the jury's life recommendation must be reversed, and the case remanded for imposition of a life sentence.

7. In its argument to the jury, the prosecution did not contend that the murder was committed for pecuniary gain or for the purpose of avoiding lawful arrest. At the sentencing hearing before the trial judge, the prosecution belatedly took the position that these aggravating circumstances were present. The trial court, in rejecting the jury's life recommendation, found both of these aggravating circumstances which the jury did not have the opportunity to consider. [Appellant wonders how a jury's life recommendation can be discarded as "unreasonable" for failure to find aggravating circumstances which the state never presented for their consideration or asked them to find]. Appellant argued on appeal that this procedure deprived him of due process of law, citing Presnell v. Georgia, 439 U.S. 14 (1978). This Court rejected his argument, saying:

> Appellant also asserts that his due process rights were violated when the appellee was permitted to argue before the trial judge at sentencing for the applicability of two aggravating factors that had not been argued before the jury. He contends that he should be allowed "to have the existence and validity of aggravating circumstances determined as they were placed before his jury." The trial judge, however, is not limited in sentencing to consideration of only that material put before the jury, is not bound the jury's recommendation, and is given final authority to determine the appropriate sentence. Prior cases make it clear that during sentencing, evidence may be presented as to any matters deemed relevant, see, e.g., Alvord v. State, 322 So.2d 533 (Fla. 1975), cert. denied, 428 U.S. 923 (1976), and that a trial judge may consider information, such as presentence and psychological reports, which were not considered by the jury during its sentencing deliberations. Swan v. State, 322 So.2d 485 (Fla.

> 1975). Furthermore, the record indicates that the trial judge ordered the presentence investigation report on appellant, after the jury's recommendation had been received, at the request of appellant's trial counsel. Use of said information, with counsel being apprised thereof, was not improper and did not violate Gardner v. Florida, 430 U.S. 349 (1977).

Appellant submits that the above conclusions cannot be reconciled with this Court's decision in Richardson v. State, supra, issued two weeks earlier. In Richardson, the defendant's death sentence was reversed and the case remanded for imposition of a life sentence in accordance with the jury's life recommendation, notwithstanding the trial court's finding of six aggravating circumstances (four of which were upheld on appeal) and no mitigating circumstances. This Court said:

> Appellant's persuasive argument focuses on the judge's prefatory comments in overriding the jury recommendation of life imprisonment. In his order imposing the death sentence, the judge supported the jury override by stating that:
>
> > The Penalty Phase jury did not have the benefit of all of the evidence due to the unusual developments in the trial process. The convicting jury was disqualified due to unforeseen circumstances not attributed to the Defendant or the State. Due to these unusual circumstances this Court is of the view that the Penalty Phase jury's recommendation was not based on all available facts and evidence.
>
> Even though we recognize the unusual procedural history of this case, we cannot countenance the denigration of the jury's role implicit in these comments. It is well-settled that a jury's advisory opinion is entitled to great weight, reflecting as it does the conscience of the community, and should not be overruled unless no reasonable basis exists for the opinion. McCampbell v. State, 421 So.2d 1072 (Fla. 1982); McCrae v. State, 395 So.2d 1145 (Fla. 1980), cert. denied, 454 U.S. 1037 (1981); Tedder v. State, 322 So.2d 908 (Fla. 1975). Because of the unusual circumstances (the penalty phase jury had not heard the evidence of guilt), counsel for both parties argued, and the trial court ruled, that the jury should be given a full presentation of the evidence. So far as the record and the briefs show, neither party was constrained in its presentation. It is a defendant's

> right to have a jury advisory opinion, and absent a voluntary and intelligent waiver of that right, a judge may not frustrate this important jury function. Lamadline v. State, 303 So.2d 17 (Fla. 1974). We cannot condone a proceeding which, even subtly, detracts from comprehensive consideration of the aggravating and mitigating factors after all parties have agreed on the appropriate evidence to be considered.
>
> Richardson v. State, supra, 1983 FLW at 328

Appellant submits that, in the light of Richardson (and for the other reasons discussed in this motion, including the unconstitutionality of the override provision) the trial court's override of the jury's life recommendation cannot stand.

WHEREFORE, appellant respectfully requests that this Court grant his motion for rehearing.

Respectfully submitted,

STEVEN L. BOLOTIN
Assistant Public Defender
Second Judicial Circuit
Post Office Box 671
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(904) 488-2458

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Raymond Marky, Assistant Attorney General, The Capitol, Tallahassee, Florida 32301 and a copy mailed to the appellant, Gregory Scott Engle, Florida State Prison, Post Office Box 747, Starke, Florida 32091 on this 30th day of September, 1983.

STEVEN L. BOLOTIN

# Supreme Court of Florida

FRIDAY, NOVEMBER 4, 1983

GREGORY SCOTT ENGLE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 57,708

Circuit Court No. 79-1180-CF Div. "R"
(Duval)



Upon consideration of the Motion for Rehearing filed in the above cause by attorney for appellant, and response thereto,

IT IS ORDERED that said Motion be and the same is hereby denied.

ALDERMAN, C.J., ADKINS, BOYD, OVERTON, McDONALD and EHRLICH, JJ., concur

Upon consideration of the Motion for Rehearing filed in the above cause by attorney for appellee,

IT IS ORDERED that said Motion be and the same is hereby denied.

ADKINS, BOYD, OVERTON, McDONALD and EHRLICH, JJ., concur
ALDERMAN, C.J., dissents

A True Copy

TEST:

Sid J. White
Clerk, Supreme Court

By: Darryn Carrie
Deputy Clerk

TC
cc: Hon. S. Morgan Slaughter, Clerk
Hon. John E. Santora, Jr., Judge

Steven L. Bolotin, Esquire
George R. Georgieff, Esquire

"WHEREAS, the Legislature has previously acknowledged its concern over the disparity in sentencing practices between the various judicial circuits in Florida, by enacting chapter 79-362, Laws of Florida, and

"WHEREAS, the Legislature by its previous act has acknowledged and approved of the continuing work of the Sentencing Study Committee of the Florida Supreme Court, which was charged with identifying the extent and causes of sentence disparity, to explore the range of sentencing reform alternatives available, and to reduce unreasonable and unjustifiable sentence variation, and

"WHEREAS, the Sentencing Study Committee's first step in the development of the sentencing guidelines pilot project was to gather the empirical data necessary to describe the implicit sentencing policy operating within each of the four judicial circuits where the study was to be carried out, and

"WHEREAS, reports from the four judicial circuits where the test was conducted indicate that a system of sentencing guidelines is a viable solution to the problem of ending sentencing disparity and will likely lead to more certainty and fairness in the sentencing process, and

"WHEREAS, a necessary first step in implementation of the sentencing guidelines system on a statewide basis is the collection of additional sentencing data from all 20 judicial circuits in Florida, and

"WHEREAS, the Legislature believes that it is in the public interest for a system of sentencing guidelines to be developed and implemented on a statewide basis within the sentencing parameters established by the Florida Statutes and in furtherance of this goal it is necessary for the Legislature and the courts to join together in a cooperative sentencing reform effort aimed at assuring certainty of punishment for the guilty and equality of justice for all. NOW, THEREFORE,"

Library References

Criminal Law ⟹1208.
C.J.S. Criminal Law § 1930 et seq.

**921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.**

**(1) Separate proceedings on issue of penalty.**—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

**(2) Advisory sentence by the jury.**—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

**(3) Findings in support of sentence of death.**—Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and



APPENDIX D

D-1

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

**(4) Review of judgment and sentence.**—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within sixty (60) days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed thirty (30) days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

**(5) Aggravating circumstances.**—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

**(6) Mitigating circumstances.**—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

Amended by Laws 1972, c. 72-724, § 9, *eff.* Dec. 8, 1972. Amended by Laws 1974, c. 74-379, § 1, *eff.* Oct. 1, 1974; Laws 1977, c. 77-104, § 248, *eff.* Aug. 2, 1977; Laws 1977, c. 77-174, § 1, *eff.* Aug. 2, 1977; Laws 1979, c. 79-353, § 1, *eff.* July 3, 1979.

Laws 1972, c. 72-724, § 9, substantially rewrote this section.

Laws 1974, c. 74-379, § 1, added the third sentence to subsec. (1).

Laws 1977, c. 77-104, a reviser's bill corrected errors and deleted obsolete or expired provisions. See Reviser's Note—1977.

Laws 1977, c. 77-174, a reviser's bill, amended this section to reflect language editorially inserted by the division of statutory revision and indexing.

IN THE SUPREME COURT OF FLORIDA

GREGORY SCOTT ENGLE,

Appellant,

v. CASE NO. 57,708

STATE OF FLORIDA,

Appellee

ON APPEAL FROM THE
CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT, IN AND
FOR DUVAL COUNTY, FLORIDA

# INITIAL BRIEF OF APPELLANT

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ISSUE I

THE TRIAL COURT ERRED BY EXCUSING PROSPECTIVE JURORS RUIS AND YOUNG FOR CAUSE WHICH ERROR DENIED THE APPELLANT HIS RIGHT TO BE TRIED BY AN IMPARTIAL JURY CONSISTING OF A FAIR CROSS-SECTION OF THE COMMUNITY AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND ARTICLE I, SECTIONS 16 AND 22 OF THE CONSITUTION OF THE STATE OF FLORIDA AND HIS RIGHTS TO EQUAL PROTECTION AND DUE PROCESS OF LAW AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND ARTICLE I, SECTIONS 2 AND 9 OF THE CONSTITUTION OF THE STATE OF FLORIDA.

Two prospective jurors, Mr. Hal Ruis and Miss Deborah E. Young, were challenged by the appellee for cause due to their beliefs about the death penalty (T-158; 177-178; 205; 211). The trial court sustained both challenges and they were excused (T-187; 211-212). When these prospective jurors voir dire responses are viewed contextually it will be seen that both were improperly excused. Neither juror unambiguously stated that he or she would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at trial nor state that their attitude toward the death penalty would prevent them from making an impartial decision as to the appellant's guilt. This is the constitutionally required test established in Witherspoon v. Illinois, 391 U.S. 510, 20 L.Ed.2d 776, 88 S.Ct. 1770 (1968) and its progeny, that is: Boulden v. Holman, 394 U.S. 478, 22 L.Ed.2d 433, 89 S.Ct. 1138 (1969); Maxwell v. Bishop, 398 U.S. 262, 26 L.Ed.2d 221, 90 S.Ct. 1578 (1970); Davis v. Georgia, 429

U.S. 122, 50 L.Ed.2d 339, 97 S.Ct. 399 (1976); Lockett v. Ohio, 438 U.S. 586, 57 L.Ed.2d 973, 98 S.Ct. 2954 (1978) and Burns v. Estelle, 592 F.2d 1297 (5th Cir. 1979). Compare also: Taylor v. Louisiana, 419 U.S. 522, 42 L.Ed.2d 690, 95 S.Ct. 692 (1975) and Duren v. Missouri, 439 U.S. 357, 58 L.Ed.2d 579, 99 S.Ct. 664 (1979).

MR. RUIS

Mr. Ruis was a social worker for the city of Jacksonville (T-167). Prior to being called for jury service he had read a newspaper article about the case but had not formed a fixed opinion regarding the guilt or innocence of the appellant (T-161). He felt he did not have a state of mind which would in any way prevent him from acting impartially (T-162). He had no bias or prejudice, either for or against the appellee or for or against the appellant (T-163). Mr. Ruis stated that if selected as a juror he would render a fair and impartial verdict based upon the evidence presented in the courtroom and the law pertaining to the case as instructed by the court (T-163-164). He had no reason and knew of no reason why he could not give the case his undivided attention, sit as a fair and impartial juror for the appellant and appellee and render a fair and impartial verdict (T-164; 165-166).

Upon questioning by the State Attorney, Mr. Ruis said he was against the death penalty but could vote a man guilty knowing that no matter what he did after that he (the man) might go to the electric chair (T-168-169). Mr. Ruis was of the opinion that a man's guilt or innocence was a separate

issue as opposed to the consequences of his behavior (T-169). He felt to a moral certainty that he could vote for a guilty verdict knowing that he (a man) might go to the electric chair (T-169). When asked by the prosecutor if he could under any circumstances, if someone was convicted, regardless of the proof or how strong it was, vote to send the man to the electric chair, he said "I would not vote to send a man to the electric chair." (T-169).

Under voir dire examination by the appellant, Mr. Ruis reaffirmed his position on the death penalty to the effect that he felt it was a totally separate issue from the issue of guilt or innocence (T-172). In response to a question about the possible bifurcated nature of the trial, Mr. Ruis said yes, when asked if he could fairly weigh the evidence that comes in during both portions of the case (T-172-173).

No further relevant questions were put to Mr. Ruis by either side. However, after the appellee had challenged him for cause and the matter was being discussed at a sidebar conference the trial judge made the following inquires:

> THE COURT: Mr. Ruis, I have to ask you a few question. You stated earlier on voir dire examination that you were opposed to the death penalty.
>
> MR. RUIS: Yes, sir.
>
> THE COURT: And, of course, that is your right to be opposed to the death penalty. We're here for the purpose of trying the case in which it is possible that the death penalty could be imposed. The law states that if a jury of 12 citizens find a defendant guilty of murder in the first degree, then it

is the responsibility of the Court either with the same jury or with another jury and, in this instance, I can assure you that it's going to be with the same jury, if that is the verdict, to have you hear aggravating circumstances put on by the State; mitigating circumstances put on by the defendant, after which you again retire to the jury room, discuss it and make a recommendation to the Court by a majority of your number, seven or six of you, whether the Court should impose the death penalty or whether the Court should impose life in prison. That is the law of this State.

Now, having expressed opposition to the death penalty, I have to ask you a few questions and you only: Would your reservations or your opposition to the death penalty or capital punishment prevent you from making an impartial decision as to the defendant's guilt?

MR. RUIS: No, sir.

THE COURT: Would you ever vote to impose the death penalty under any circumstances?

MR. RUIS: At this point, I would say no.

THE COURT: Would you refuse to consider imposition of the death penalty in the case we are now about to try, even if he is found guilty by the jury? Would you refuse to consider the death penalty?

MR. RUIS: Yes.

(T-180-182).

After the above-quoted inquiry, there was an additional sidebar discussion at which time the appellant requested permission to ask Mr. Ruis further questions about following the law. The appellee objected and no further inquiry was had

(T-182-184; 185-187). At the appellee's request, a ten minute recess was taken, after which their challenge was sustained and Mr. Ruis was excused for cause (T-182-183; 186-187).

At the very least, Mr. Ruis' answers to the questions about the death penalty were ambiguous. This is especially true when they are measured in terms of how the questions were phrased and when viewed in the light of his responses to the general voir dire questions. This ambiguity was argued by counsel for the appellant when he urged that Mr. Ruis' opposition to the death penalty was not so fixed as to preclude his weighing and considering the evidence in the sentencing portion of the case (T-178; 185). Indeed, counsel below noted that even Mr. Ruis' most direct answer to the court about his ability to consider the death penalty (at this point) in the event of a guilty verdict was subject to differing conclusions or deductions due to his prior answer that he would weigh and consider all the evidence in the sentencing portion of trial (T-182-184). Clearly there was no reason to believe, from all of his responses, that he wouldn't follow the law and even if there was a doubt it could and should have been resolved by granting the appellant's request to further question Mr. Ruis on the issue.

It is interesting to observe that during the sidebar discussion about Mr. Ruis, the State Attorney said: "The statute says it is proper preemptory challenge for cause." (T-183). No specific citation to the statute was made but presumably the State Attorney's ambiguous reference related to Section 913.13, Florida Statutes, which states: "A person

who has beliefs which preclude him from finding a defendant guilty of an offense punishable by death shall not be qualified as a juror in a capital case." See also: Foster v. State, 369 So.2d 928 (Fla. 1979). Most assuredly Mr. Ruis did not fit within this statutory disqualification because he felt to a moral certainty that he could vote for a verdict of guilty knowing the appellant might go to the electric chair (T-169; 181). Thus, not being statutorily disqualified, the question is whether Mr. Ruis was properly excused for cause under the prevailing case authorities construing the constitutional provisions involved.

Given the fact that Mr. Ruis had been advised of the bifurcated nature of the proceedings and that the jury's sentencing recommendation would not be made until after a guilt determination and, then, only after the presentation of aggravating and mitigating circumstances and given his willingness to fairly and impartially weigh the evidence at both portions of the case and to abide by the court's instruction on the law, it is obvious that Mr. Ruis was not irrevocably committed to vote against the death penalty regardless of the facts and circumstances which might emerge in the course of the proceedings. This is the proper constitutional standard to be applied. As was indicated in Boulden v. Holman, 394 U.S. at 483-484, it is entirely possible that a person who has "a fixed opinion against" or who does not "believe in" capital punishment might nevertheless be perfectly able as a juror to abide by the existing law - to follow conscientiously the instructions of a

trial judge and to consider fairly the imposition of the death sentence in a particular case. Based upon the totality of his voir dire responses, Mr. Ruis was just such a person as described in Boulden v. Holman, supra. His exclusion as a venireman, because of his responses was impermissible under Witherspoon v. Illinois, supra and see Maxwell v. Bishop, 398 U.S. at 265-266.

MISS YOUNG

Deborah E. Young had knowledge about the case from the newspaper but had formed no fixed opinion regarding the guilt or innocence of the appellant (T-205-206). When asked how she felt about the death penalty she said she was opposed to the death penalty (T-206). Like Mr. Ruis, even though she was opposed to the death penalty she said her opposition would not prevent her from bringing back a guilty verdict if she were convinced beyond every reasonable doubt that the appellant was guilty of murder in the first degree (T-206-207). Thus, she was not disqualified from service by operation of Section 913.13, Florida Statutes. See also: Foster v. State, supra.

When the trial judge inquired, in the event of conviction, and after the second portion of trial, Miss Young would participate in a vote recommending the death penalty she said she would not so participate and would not vote for the death penalty (T-207). When pressed by the court on the question, that is, when specifically asked "No matter what the circumstances were, you would not vote for the death penalty?" She replied, "I don't think I would" (T-207).

On voir dire examination by the appellant (counsel explained

more fully the bifurcated nature of the proceedings and the role of a juror) Miss Young answered yes when asked if she would weigh and consider the evidence of aggravating and mitigating circumstances (T-208-209). When asked if she would consider the law and abide by the law that the judge would give, she said "Yes" (T-209). Because of these responses the appellee apparently decided to question Miss Young (T-207; 209). On inquiry by the appellee, Miss Young equivocated on whether she could, under any circumstances, vote to put the appellant in the electric chair (T-209-210). Ultimately the State Attorney asked her, with reference to voting to put the appellant in the electric chair,: "Under any circumstances, you could not, could you?" And she answered: "No, sir." (T-210). After this response the judge asked if there was a challenge, the appellee said yes and Miss Young was excused for cause (T-211). Counsel for the appellant asked permission to approach the bench and a sidebar conference was held (T-211-212). Objection was lodged to the challenge for cause. The court reaffirmed its ruling and sustained the appellee's challenge (T-211-212). The trial court's ruling with regard to Miss Young was erroneous.

Miss Young's disqualification as a potential juror was impermissible for the same reasons previously given to demonstrate that Mr. Ruis was erroneously excused from service. She was open and receptive to weighing the evidence at both stages of trial and willing to consider the law and abide by the law as given by the court. Therefore, her opposition to the death penalty was a general objection and, as such, was an impermissible ground upon which the court could exclude her

from service. Her total voir dire responses indicated that there were some kinds of cases in which she would refuse to recommend capital punishment (T-205-211). But even this should not have barred her from jury duty. In Witherspoon v. Illinois, supra, the Court addressed the very question posed by Miss Young's voir dire examination and exclusion:

> Just as veniremen cannot be excluded for cause on the ground that they hold such views, so too they cannot be excluded for cause simply because they indicate that there are some kinds of cases in which they would refuse to recommend capital punishment. And a prospective juror cannot be expected to say in advance of trial whether he would in fact vote for the extreme penalty in the case before him. The most that can be demanded of a veniremen in this regard is that he be willing to consider all the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings. If the voir dire testimony in a given case indicates that veniremen were excluded on any broader basis than this, the death sentence cannot be carried out even if applicable statutory or case law in the relevant jurisdiction would appear to support only a narrower ground of exclusion.
>
> 391 U.S. at 522, Footnote 21. (Emphasis by court)

Miss Young was not correctly disqualified.

The proceedings in the court below with Mr. Ruis and Miss Young excluded from service at both the guilt and punishment phases of trial, deprived the appellant of his constitutional right to be tried by an impartial jury composed of people

chosen from a fair cross-section of the community. Both Ruis and Young were disqualified because they voiced general objections to the death penalty and not because they explicitly indicated an inability to follow the law and instructions of the trail judge. The basis for their disqualification was too broad. Witherspoon v. Illinois, supra, and Lockett v. Ohio, supra, 438 U.S. at 596-597. The improper exclusion of either one of these venire persons constitutionally precludes the carrying out of the death sentence imposed. Witherspoon v. Illinois, supra, and Davis v. Georgia, supra. The disqualification of Mr. Ruis and Miss Young should require that the appellant's conviction be set aside for a new trial.

ISSUE VI

THE TRIAL COURT ERRED BY REJECTING THE JURY'S SENTENCING RECOMMENDATION OF LIFE IMPRISONMENT AND BY IMPOSING A SENTENCE OF DEATH UPON THE APPELLANT WHICH IMPOSITION, IF SUSTAINED AND CARRIED OUT, WILL UNCONSTITUTIONALLY DEPRIVE THE APPELLANT OF HIS LIFE.

BASIC CONSTITUTIONAL OBJECTIONS

On principle and for preservation the appellant would initially state certain constitutional objections to the trial judge's rejection of the jury's sentencing recommendation of life imprisonment. The Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Sections 9, 16, 17, and 22 of Article I of the Constitution of the State of Florida guarantee the appellant a trial by jury, that his life will not be taken without due process of law, that his life will not be twice put in jeopardy and that he should not suffer cruel and/or unusual punishment. All of these constitutional rights are transgressed when a trial judge imposes a death sentence in spite of a jury recommendation for life. The issues raised by this assertion have been briefed in the pending cases of Phippen v. State, Case No. 54,664; Porter v. State, Case No. 55,841, and Johnson v. State, Case No. 56,167 and this Court's attention is respectfully directed to those cases for a full presentation of these issues. Additionally, the appellant is accutely cognizant that in Douglas v. State, 373 So.2d 895 (Fla. 1979) this Court rejected Douglas' double jeopardy claim which was directed toward the trial judge's failure to follow a jury recommendation for life. While the issue was rejected on its merits, it should be noted that the Douglas case involved an expedited

appeal from a denial of post-conviction relief sought pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure and that the Court's opinion indicated that the argument was more fully developed in the pending direct appeal cases in Phippen and Porter, supra. Further argumentation of these basic constitutional violations will not be made in this brief. As necessitated, specific constitutional transgressions will be mentioned as they apply to the facts of this case in discussion below.

THE STANDARDS FOR SENTENCE REVIEW

This Court, as the final step in the state judicial system has, by statute and case law, and independent responsibility to decide whether the imposition of the ultimate penalty of death is warranted. Section 921.141(4), Florida Statutes; State v. Dixon, 283 So.2d 1 (Fla. 1973); Songer v. State, 322 So.2d 481 (Fla. 1975); Adams v. State, 341 So.2d 765 (Fla. 1976) and McCaskill v. State, 344 So.2d 1276 (Fla. 1977). In cases where the jury has recommended that a life sentence be imposed, this Court has set forth certain standards to guide trial judges in determining whether to reject the jury's advisory opinion. By like token if the recommendation is rejected by the trial judge, those standards govern this Court's review of the death sentence.

Early on in the post-Dixon appellate litigation of capital cases it was recognized that trial judges should not hastily reject a jury's recommendation for life. Taylor v. State, 294 So.2d 648 (Fla. 1974). This is so because the trial court and this Court must consider the jury's advisory opinion in assessing the propriety of the death sentence. In fact, in some instances

the jury's recommendation can be ". . . a critical factor in determining whether or not the death penalty should be imposed." Lamadline v. State, 303 So.2d 17, 20 (Fla. 1974). By 1975 these early pronouncements were honed to the point of proper legal principle. The applicable guideline is today, as it was then, announced in Tedder v. State, 322 So.2d 908 (Fla. 1975):

> A jury recommendation under our trifurcated death penalty statute should be given great weight. In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.
>
> 322 So.2d at 910

Subsequent to the decisions in Lamadline and Tedder, supra, this Court judicially recognized that despite general knowledge and concern of the citizenry over the substantial increase in crime, juries under Florida's death penalty statute have been reluctant to recommend the imposition of death in all but the most aggravated cases. McCaskill v. State, supra at 1280. Furthermore, the Court in McCaskill reiterated the democratic notion that juries are the conscience of our communities and reaffirmed the, by then, established appellate standard that: "This Court, in reviewing the propriety of the death sentence, must weigh heavily the advisory opinion of the sentencing jury." McCaskill v. State, supra at 1280. To like effect see: Malloy v. State, ___ So.2d ___, Case No. 49,850, opinion filed December 20, 1979, at page 6 of the slip opinion.

In his concurring opinion in Chambers v. State, 339 So.2d 204 (Fla. 1976) Chief Justice England detailed the historical (if not at this point constitutionally compelled) reason why the

jury's recommendation should be followed:

> Where a jury and trial judge reach contrary conclusions because the facts derive from conflicting evidence, or where they have struck a different balance between aggravating and mitigating circumstances which both have been given an opportunity to evaluate, the jury recommendation should be followed because that body has been assigned by history and statute the responsibility to descern truth and mete out justice. Given that the imposition of a death penalty "is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment . . .", both our Anglo-American jurisprudence and Florida's death penalty statute favor the judgment of jurors over that of jurists. (Footnote omitted).
>
> 339 So.2d at 208-209.

See also Cooper v. State, 336 So.2d 1133 (Fla. 1976).

With the appropriate standard for review established, the appellant feels confident that this Court's "final step" consideration of his case will result in a reversal of the completely unwarranted imposition of the death sentence. In order to place the jury's life recommendation in proper perspective there are certain facts from the record which should be detailed.

THE FACTS

Before they were accepted and sworn the prospective jurors were apprised of what the State Attorney described as the "awesome ugly substance of this case" (T-221; 242). The jury was comprised of people who believed in the death penalty (T-9-242; 1047; 1071). Perhaps this is why when the jury was accepted the State Attorney ingratiatingly announced that the state would ". . . be pleased to try this case before this jury." (T-242). (The

State's Attorney's happiness with the trier of fact no doubt disappeared sometime after their life recommendation (R-111;T-1039;1048).

The jury deliberated almost six hours before arriving at their verdict of guilt. Immediately thereafter the penalty phase of trial was conducted. The appellee was apparently satisfied that its evidence for guilt was a sufficient basis for its penalty phase argument because it made its case for aggravation on the oratorical skills of the State Attorney without any additional evidence (T-986-1000). Those forensic abilities were heightened somewhat by the prosecutor's demonstrative reference to "the after picture" of the victim (T-989-990) (See Issue III, supra) and a "noise" he made during that reference for which he properly pardoned himself to the court (T-990). Additionally, with a first degree murder conviction in his pocket the State Attorney made the following descriptive references to the appellant during his penalty argument: ". . . this murderer over here" (T-998); "Mr. Kool" (T-990; 994; 998); "the murderer" (T-995); "Mr. Murderer" (T-998); "he is a murderer" (T-998-999) and, "murderer" (T-1000).

On the merits of the case, during its penalty argument, the appellee argued that there were two statutory aggravating circumstances applicable: that the capital felony was committed while the appellant was engaged in the commission of a robbery, rape (sexual battery) and/or kidnapping (See Section 921.141 (5)(d), Florida Statutes) and that the capital felony was especially heinous, atrocious or cruel. (See Section 921.141(5)(h), Florida Statutes) (T-990-995). In terms of statutory mitigating circumstances, the prosecutor virtually conceded the existence of Section 921.141(6)(a), Florida Statutes, that the defendant

has no significant history of prior criminal activity for he said: "Let's look at what the murderer has going for him. There is no significant history of any prior criminal activity. We don't know anything about that, so I guess that's a plus for him." (T-995). The prosecutor argued against the existence of the other statutory mitigating circumstances (T-995-998). The appellee concluded its argument by asking that the jury listen carefully to, and follow, the court's instructions and urged death as the appropriate sentence (T-999-1000).

Like the appellee, the appellant offered no evidence during the penalty phase of trial. Through counsel, the appellant countered the appellee's argument by urging that the evidence against him was very weak (T-1005; 1007); that the evidence was circumstantial (T-1004-1005 ; 1021); that there was no evidence of what participation he had in the offense, if any, after going to the robbery (T-1008; 1021-1022); that from the evidence, length of deliberations, and questions during deliberations, that the jury had found him guilty as an accessory and accomplice to Rufus Stevens (T-1004-1005 ; 1007-1009; 1010; 1013-1014; 1016-1017; 1022); that by all the evidence he did not take the victim's life (T-1009-1010; 1031-1014; 1017; 1019; 1022); that because he had been found guilty on a principal theory as an accomplice to Rufus Stevens while the statutory aggravating circumstances argued by the appellee might apply to Rufus Stevens they did not apply to him (T-1011-1014).

Pursuant to Section 921.141(6), Florida Statutes, the appellant argued that the following statutory mitigating circumstances applied to him: Section 921.141(6)(a), Florida Statutes--

no significant history of prior criminal activity (T-1014); Section 921.141(6)(d), Florida Statutes,--that he was an accomplice not the killer (T-1015-1016); Section 921.141(6)(e), Florida Statutes,--that he acted under the substantial domination of another person (Rufus Stevens) (T-1016; 431; 456) and Section 921.141(6)(g), Florida Statutes,--his age (T-1017).

After the appellant's penalty argument the jury was charged in accordance with the standard penalty phase instructions (T-1022-1028). See: Florida Standard Jury Instructions in Criminal Cases, Second Edition at pages 76-81. Twenty-five minutes after receiving their penalty charge the jury returned its advisory recommendation of life imprisonment (T-1028; 1031).

THE FACTS AND LAW APPLIED

It is clear that there were several good reasons for the jury's recommendation both by statute and by case decision. Lockett v. Ohio, 438 U.S. 586, 57 L.Ed.2d 973, 98 S.Ct. 2954 (1978); Songer v. State, 365 So.2d 696 (Fla. 1978) and Malloy v. State, supra. Lockett plainly established the constitutional requirement under the Eighth and Fourteenth Admendments that in all but the rarest kind of capital case the defendant is allowed to proffer as a mitigating factor, any aspect of his character or record and any of the circumstances of the offense as a basis for a sentence less than death. This is exactly what the appellant argued to his jury and eventually to the judge. Lockett leaves open the constitutional question (which would be applicable to the appellant) as to whether a sentence of death can be carried out without a finding that the defendant engaged in conduct with the

conscious purpose of producing death. See especially footnote 16 at 438 U.S. 609 and Mr. Justice White's concurring and dissenting opinion in Lockett at 438 U.S. 621-628. This latter question need not be answered by this Court if the Court reverses the appellant's death sentence on the settled principles heretofore and hereafter advanced. Conversely, should the Court affirm the appellant's conviction and decline to reverse or set aside the sentence of death on this or any other issue it would be faced foursquare with the open-Lockett question. This is true because even if the reasoned "genius" of the jury's recommendation (See Justice Sundberg's concurring opinion in Jones v. State, 332 So.2d 615, 620-622 (Fla. 1976)), is not perceived, it is certain from the facts, arguments of counsel and by the appellee's own admission (T-994-995; 1080-1081) that there is no proof approaching a reasonable doubt standard that the appellant took, attempted or intended to take the victim's life.

A reading of the sentencing transcript (T-1033-1092) and the trial court's written findings in support of the death sentence (R-114-119) make it equally clear that the trial court completely disregarded (without stating any reason) the jury's recommendation contrary to the Tedder standard. Furthermore, the trial judge manifestly overlooked and failed to consider the fact that mitigating circumstances are not limited to those listed in Section 921.141(6), Florida Statutes (T-1085). This latter action by the trial judge contravenes Lockett and Songer, supra.

With regard to aggravating circumstances the appellee altered its position between the time the jury rendered its advisory

opinion and the time the case came on for sentencing (T-990-995; 1080-1082). Along the way it found two additional aggravating circumstances and urged to the trial judge that the capital felony had been committed for the purpose of avoiding lawful arrest and for pecuniary gain. See: Section 921.141(5)(e)(f), Florida Statutes (T-992; 1081). Even though these aggravating circumstances had not been argued to the jury as part of a basis of a death recommendation (T-992; 1013), the jury was instructed that these were aggravating circumstances that they could consider (T-1023-1024). Notwithstanding the hindsight change in position by the appellee and the jury's obvious rejection of these aggravating circumstances, the trial court went on to find both the aggravating circumstances argued at trial and the additional circumstances urged at sentencing (T-990-995; 1081-1082; 1086-1089; R-114-119). This action by the trial court was constitutionally erroneous even if the Tedder standard did not exist.

In Presnell v. Georgia, 439 U.S. 14, 58 L.Ed.2d 207, 99 S.Ct. 235 (1978) the Court held that fundamental principles of procedural fairness (due process of law) apply with no less force at the penalty phase of trial in a capital case than they do in the guilt-determining phase of any criminal trial. See also: Gardner v. Florida, 430 U.S. 349, 51 L.Ed.2d 393, 97 S.Ct. 1197 (1977), and Green v. Georgia, _____ U.S. _____, 60 L.Ed.2d 738, 99 S.Ct. ____ (1979). Pursuant to Presnell the appellant believes that as a matter of due process he is entitled to have the existence and validity of aggravating circumstances determined as they were placed before his jury. Any other conclusion which

would open the door for a post-jury determination of aggravating circumstances would not only deprive the appellant of due process but would also deny him his right to trial by jury. Post-jury determination of aggravating circumstances would correlatively destroy the trifurcated sentencing procedures which were, in great measure, the basis for the conclusion that capital punishment was constitutionally permissible. State v. Dixon, supra and Profitt v. Florida, 428 U.S. 242, 49 L.Ed.2d 913, 96 S.Ct. 2960 (1976). The capital sentencing process under Section 921.141, Florida Statutes, creates a system of checks and balances which requires that the jury's advisory function not be distorted, lest the whole statutory scheme be distorted. Messer v. State, 330 So.2d 137 (Fla. 1976), Miller v. State, 332 So.2d 65 (Fla. 1976) and Cooper v. State, supra. The point is well made, again by Chief Justice England in his concurring opinion in Chambers v. State, supra:

> In Tedder v. State, 322 So.2d 908 (Fla. 1975), we emphasized the weight to be given jury recommendations in capital cases and held that a death penalty is inappropriate following a jury recommendation of life imprisonment unless the facts suggesting death were so clear and convincing that virtually no reasonable person could differ. The considerations underlying that decision were further explained in Cooper v. State, 336 So.2d 1133 (Fla. 1976), a case involving a jury recommendation of death. There we elaborated on the respective functions of the judge and jury in death penalty cases, explaining that the judge's role is primarily to insure the jury's adherence to law and to protect against a sentence resulting from passion rather than reason. Our directive there was that the jury's advisory function may not be distorted by the omission of any aggravating or mitigating circumstance (absent acquiescence by all parties) was a calculated step to insure

> that a jury and judge could never reach differing conclusions on a sentence as a result of misunderstanding the law or applying different standards to the peculiar facts before them.

339 So.2d at 208

Finally, a fair contextual reading of the transcript of the sentencing hearing and the judge's written sentence findings (T-1033-1092; R-114-119) will demonstrate that the trial judge did not enter the hearing with anything close to an open mind or with due regard for the great weight to be given the jury's recommendation. There is no other way to explain his sentence findings, which were right in line with the appellee's belated discovery of aggravating circumstances, which completely failed to even mention the jury's recommendation and completely failed to find statutory mitigating circumstances or to give independent mitigating weight to the nonstatutory mitigating factors proffered by the appellant. There is no other way to explain the trial court's statement to appellant's counsel in response to counsel's Tedder argument, to-wit: "Well, that is my recollection but I think it's immaterial at this point. Save that fodder for the Supreme Court or wherever it goes." (T-1047; 1045-1047) There is no other way to explain the trial judge's remarks to appellant's counsel to the effect that he should reserve his arguments for subsequent appeals (T-1048; 1074) and the following colloquy:

> MR. SHORSTEIN: Absolutely, Your Honor, and I have cases to cite to Your Honor that the Supreme Court finds the distinction differentiation.
>
> THE COURT: Well, then, the Supreme Court will just have to make its ruling in this case, too.

MR. SHORSTEIN: Well, Your Honor, I am just trying to argue what I think the law is to the Court.

THE COURT: Well, I have to listen to you and you have, I must say, done a fantastically great job in coming up with these innovations. They're interesting.

(T-1063)

Because of the trial judge's disregard for this Court's cases and to assist this Court in its independent review of the cause, the appellant feels compelled to list those cases to which his should be compared: Taylor v. State, supra; Slater v. State, 316 So.2d 539 (Fla. 1975); Swan v. State, 322 So.2d 485 (Fla. 1975); Tedder, supra; Thompson v. State, 328 So.2d 1 (Fla. 1976); Jones v. State, 332 So.2d 615 (Fla. 1976); Provence v. State, 337 So.2d 783 (Fla. 1976); Chambers v. State, supra; Burch v. State, 348 So.2d 831 (Fla. 1977); McCaskill v. State, supra; Buckrem v. State, 355 So.2d 111 (Fla. 1978); Brown v. State, 367 So.2d 616 (Fla. 1979) and Malloy, supra. Review of these cases will show the legal and factual impropriety of the death sentence imposed upon the appellant. While the trial judge may think of this Court's cases as "fodder" and innovative, they are the law of this state and the appellant is entitled to their protection.

This Court's case interpretations and construction of Section 921.141, Florida Statutes, since Dixon, supra, were disregarded and incredibly distorted by both the appellee and the trial court. In Dixon, supra, this Court envisioned trial judges as being in a position by education and experience to temper the inflammed emotions of inexperienced jurors to whom no capital crime might

appear less than heinous and deserving of the ultimate punishment. Sadly, this Court is now being placed in a posture of having to temper the zeal of a prosecutor who cannot accept the voice of those whom he claims to represent (T-1000) and a trial judge who refused to heed the message twice sent to him by the conscience of his community (R-111). McCaskill, supra and Stevens v. State, Case No. 57,738. Upon reason and authority the appellant hopes and prays this Court will listen. The appellant's sentence should be reduced to life.

IN THE SUPREME COURT OF FLORIDA

GREGORY SCOTT ENGLE, :

Appellant, :

vs. : CASE NO. 57,708

STATE OF FLORIDA, :

Appellee. :

_____ :

ON APPEAL FROM THE
CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT, IN AND
FOR DUVAL COUNTY, FLORIDA

# REPLY BRIEF OF APPELLANT

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## II ARGUMENT

ISSUE I

There appear to be three (3) areas of judicial inquiry raised by the appellee's response on this issue: (1) whether prospective jurors Ruis and Young were properly excused for cause; (2) if they were improperly excluded is the appellant entitled to have his conviction reversed; and, (3) if they were improperly excluded is the error harmless in light of the jury's subsequent recommendation of life.

The first inquiry presents a mixed question of law and fact which the Court will have to resolve. For this resolution, the appellant will rely on the arguments and authorities previously made and cited in his initial brief.

The second inquiry poses what is apparently an "open" question. The appellee states that it knows of no reported case where a judgment of guilt was set aside and a new trial ordered due to a violation of Witherspoon v. Illinois, 391 U.S. 510, 20 L.Ed.2d 776, 88 S.Ct. 1770 (1968) (BA-6). The appellant is unable, at this point, to cite a decision which would absolutely require that he be granted a new trial if it is true, as is maintained, that Mr. Ruis and Miss Young were impermissibly removed for cause. The appellant's prayer for relief on this point used the word "should" (AB-25) and was based upon the following language appearing in Lockett v. Ohio, 438 U.S. 586, 57 L.Ed.2d 973 98 S.Ct. 2954 (1978):

> Each of the excluded veniremen in this case made it "unmistakably clear" that they could not be trusted to "abide by existing law" and to "follow conscientiously the instructions" of the trial judge. Boulden v. Holman, 394 U.S. 478, 484, 22 L.Ed.2d 433, 89 S.Ct. 1138 (1969). They were thus properly excluded under Witherspoon, even assuming, arguendo, that Witherspoon provides a basis for attacking the conviction as well as the sentence in a capital case.
>
> 438 U.S. at 596.

The appellant would like this Court to "close" the arguendo-"open" question in Lockett, supra, in a way favorable to him. Failing this if, and when, the matter is resolved in a way that is beneficial to the appellant he certainly does not want to be foreclosed from consideration on the basis that he somehow "waived" his right to relief because he did not timely assert his beneficial entitlement to the application of an unsettled principle of law.

From a position of hindsight, based upon the jury recommendation of life, the appellee argues that any Witherspoon violation is harmless error. Perhaps the trifrucated nature of Section 921.141, Florida Statutes, does render the Witherspoon error meaningless inasmuch as it was the judge who decided to impose the ultimate penalty. Nevertheless, the appellant would suggest that the error will not be rendered harmless as to him unless or until the open question from Lockett is answered in his favor, or this Court, for whatever reasons, adopts the jury recommendation for life. (See Issue VI.)

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Appendix to the Petition for Writ of Certiorari has been furnished by U.S. Mail to the Honorable Alexander L. Stevas, Clerk of the Supreme Court of the United States, First and Maryland Avenue, N.E., Washington, DC 20543; Gregory Scott Engle, #069240, Florida State Prison, Post Office Box 747, Starke, Florida 32091; and copies furnished by hand delivery to the Honorable Sid White, Clerk of the Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32301 and to Raymond L. Marky, Assistant Attorney General, The Capitol, Tallahassee, Florida 32301 on this 3rd day of January, 1984.

Steven L. Bolotin

STEVEN L. BOLOTIN

NO. 83-6043

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

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GREGORY SCOTT ENGLE,

Petitioner,

-VS-

STATE OF FLORIDA,

Respondent.

---

# RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

---

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## QUESTIONS PRESENTED

### QUESTION I

THE PROSPECTIVE JURORS RUIS AND YOUNG WERE PROPERLY EXCUSED FOR CAUSE AFTER STATING THEY WERE UNABLE TO CONSIDER THE IMPOSITION OF A DEATH SENTENCE UNDER ANY CIRCUMSTANCES AND PETITIONER DID NOT PROPERLY PRESENT THE CLAIM THAT SUCH EXCUSAL RESULTED IN A "PROSECUTION PRONE" JURY WHICH DENIED HIM HIS RIGHT TO A FAIR AND IMPARTIAL JURY.

### QUESTION II

THE DECISION BELOW VACATING THE SENTENCE OF DEATH AND REMANDING FOR A NEW SENTENCING HEARING AND DETERMINATION IS NOT A FINAL JUDGMENT AND THIS COURT LACKS JURISDICTION UNDER 28 U.S.C. §1257(3) TO REVIEW SAID DECISION. IF JURISDICTION EXISTS, THE PETITION FAILS TO DEMONSTRATE A SUBSTANTIAL FEDERAL QUESTION RESPECTING THE VALIDITY OF §921.141, FLA.STAT., EITHER ON ITS FACE OR AS APPLIED.

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## PRELIMINARY STATEMENT

Respondent accepts that portion of the Petition for Writ of Certiorari setting forth the Citation to Opinion Below, Jurisdiction, and Constitutional and Statutory Provisions Involved as found on page one of the petition. Respondent does not accept the Questions Presented and has accordingly restated them.

## STATEMENT OF THE CASE AND FACTS

Respondent accepts the brief statement of the case as stated on pages one and two of the petition except the statement that the Supreme Court ". . . approved the court's [trial court] override of the jury's life recommendation. . ." (Pet. at p. 1). The Supreme Court of Florida did not reach the issue of whether the judicial rejection of the jury recommendation satisfied the requirements of Tedder v. State, 322 So.2d 908 (Fla.1975), simply because the Court vacated the sentence of death and remanded it to the trial court with "instructions to conduct another sentence hearing" without empaneling another jury, 438 So.2d at 814. The Court vacated the sentence of death because the trial judge, over the objection of trial counsel, considered a statement given by petitioner's accomplice which implicated petitioner as a coperpetrator of the homicide without affording the latter the right to confront and cross-examine Stevens in violation of this Court's decision rendered in Bruton v. United States, 391 U.S. 123 (1968), 438 So.2d at 813-814. The Supreme Court of Florida never even intimated whether the rejection of the jury recommendation could or would be sustained under Tedder for the obvious reason that the necessity of such a determination would depend on whether the trial judge on remand reimposes a death sentence. Should a life sentence be imposed, the Tedder analysis will never arise! The legal significance of this--

which will be discussed hereinafter--perhaps explains why counsel has erroneously stated the Supreme Court approved the override.

Counsel has totally failed to set forth the facts of the horrible crime of which petitioner stands convicted. The facts, which show the familiar risks encountered by citizens who must work at all-night convenience stores and demonstrate that the innocent and hard working people of this nation are totally deprived of their right to "domestic tranquility", are set out in the opinion of the Florida Supreme Court as follows:

> At approximately 2:00 A.M. on March 13, 1979, Gregory Scott Engle and Rufus E. Stevens plotted to rob the Majik Market and to remove the attendant in order that she may not be able to identify them. At approximately 4:20 A.M. on March 13, 1979, Kathy Tolin, 5 feet tall, 115 pounds, was confronted by Gregory Scott Engle, in the company of Rufus E. Stevens, with a large pocketknife, at which time she turned over the contents of the cash register to Engle, determined later to be $67.00. She was forcibly removed from the Majik Market and placed in a car owned by Rufus Stevens; at which time she was driven to a secluded wooded area nearby and both men raped her. She was then taken to an area approximately 200 feet deeper into the woods where a rope was placed around her neck and she was strangled. Then the large pocketknife was plunged into her back and her vagina was mutilated by a man's hand or a bottle. Either the rope around her neck or the knife wounds could have killer her. The four-inch tear inside the vagina was inflicted as she was dying. Her body was dragged, face down, into the underbrush almost causing one side of her face to be unrecognizable.
>
> Both defendants returned home around 7:00 A.M., March 13, 1979, and the body of Kathy Tolin was found by two boys around 10:00 A.M. on March 14, 1979.

438 So.2d at 806.

As could be expected the petitioner and Stevens who robbed together, kidnapped together and raped together, when charged with first degree murder successfully obtained separate trials so each could accuse the other of committing the homicide, when anyone familiar with both cases well knew one of the two, or both, had to kill Kathy Tolin. The victim, the only other person present, was in no position to identify her actual killer or killers.

Other facts deemed relevant to a disposition of whether this Court should grant discretionary review will be included in the argument portion of this response.

## REASONS WHY THE WRIT SHOULD NOT BE GRANTED, OR IF GRANTED, WHY THE JUDGMENT SHOULD BE SUMMARILY AFFIRMED

### QUESTION I

THE PROSPECTIVE JURORS RUIS AND YOUNG WERE PROPERLY EXCUSED FOR CAUSE AFTER STATING THEY WERE UNABLE TO CONSIDER THE IMPOSITION OF A DEATH SENTENCE UNDER ANY CIRCUMSTANCES AND PETITIONER DID NOT PROPERLY PRESENT THE CLAIM THAT SUCH EXCUSAL RESULTED IN A "PROSECUTION PRONE" JURY WHICH DENIED HIM HIS RIGHT TO A FAIR AND IMPARTIAL JURY.

### ARGUMENT

Petitioner, stating that the Florida Supreme Court's determination that prospective jurors Ruis and Young were properly excused because they could not consider the death penalty under any circumstances is "highly questionable in light of Witt v. Wainwright, 714 F.2d 1069 (11th Cir.1983)", reh. en banc denied January 4, 1984, asserts that his argument in this petition is based primarily on the recent decision in Grigsby v. Mabry, 569 F.Supp. 1273 (E.D.Ark.1983), appeal pending, No. 83-2113 (CA8 filed August 8, 1983)--the "prosecution prone" or "guilt prone" claim--which he quotes from extensively. (Pet. at 5-7).

Respondent respectfully submits that there are several reasons why this Court should not grant review or, alternatively, should summarily affirm the judgment.

First, this claim was raised for the first time on the petition for rehearing filed in the Supreme Court of Florida.

as is evident from petitioner's appendix, and under Florida law an issue may not be raised for the first time in a motion for rehearing. Sarmiento v. State, 371 So.2d 1047, 1053 (Fla.3rd DCA 1979), approved, 397 So.2d 643 (Fla.1981).

In the petitioner's brief filed in the Supreme Court he urged that Ruis and Young were improperly excused and therefore he was deprived of his constitutional right to be tried by an impartial jury composed of people chosen from a fair cross-section of the community which precluded carrying out the sentence of death and required a vacation of the conviction (Pet. App. E 2-11). Even in the reply brief, petitioner's attorney--a different attorney than the one now representing him--asserted he was entitled to a vacation of his conviction ". . . if it is true, as maintained, that Mr. Ruis and Miss Young were impermissibly removed for cause. . ." (Pet.App. F 1).

The Grigsby claim is distinctly different from the claim tendered to the Supreme Court of Florida. Indeed, the very judge that wrote Grigsby recognized there is a difference between a Witherspoon claim and the claim presented in that case. Hulsey v. Sargent, 550 F.Supp. 179 (E.D.Ark.1982) holding Wainwright v. Sykes, 433 U.S. 72 (1977) precluded a Grigsby claim not timely presented in the state courts.

Grigsby is predicated on an entirely different theory than a Witherspoon claim. The argument there is that because the prospective juror has stated he or she could impartially decide guilt, he or she cannot be excused for cause notwithstanding the fact that he or she cannot consider the issue of punishment and is properly excused for that reason because to do so leads to a "prosecution prone" jury on the issue of guilt which denies the accused a fair and impartial jury. Inasmuch as the claims are separate discrete claims and the Grigsby claim was first presented on rehearing in violation of Florida law, petitioner

has not demonstrated his newly constructed claim presented herein was passed on by the Florida Supreme Court. Hence, petitioner has failed to demonstrate the jurisdiction of this Court as required by Webb v. Webb, 451 U.S. 493 (1981) and Cardinale v. Louisiana, 394 U.S. 437 (1969).

Secondly, petitioner's trial attorney never raised the claim presented and did not proffer any evidence to support the Grigsby theory which explains why the appellate attorney never presented the "prosecution proneness" argument to the Supreme Court, for without evidence the claim would be rejected as it was in Witherspoon, supra; Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir.1978) and Smith v. Balkcom, 660 F.2d 573 (5th Cir. 1981). Of course, in Grigsby evidence was presented in that case in a timely and proper fashion, the validity and effect of which has not yet been finally determined. This petitioner, by not presenting any evidence at trial or even raising the claim at trial and on appeal, except on rehearing, is procedurally barred from presenting it under Sykes and Hulsey v. Sargent, supra.

Third, even if the issue was properly before this Court, the claim is meritless. Spinkellink v. Wainwright; Smith v. Balkcom; Maggio v. Williams, ___U.S. ___, 78 L.Ed.2d 43 (1983); Sullivan v. Wainwright, ___ U.S. ___, 78 L.Ed.2d 210 (1983) and Hutchinson v. Garrison, ___ U.S. ___ (1984), Case No. A-557, Opinion filed January 11, 1984, Rehnquist, J., concurring. This "prosecution bias" claim was raised by Sullivan in his application for stay of execution and was rejected as "meritless" and in Maggio this Court vacated a stay of execution where this claim was also raised saying it warranted little discussion, 78 L.Ed. 2d at 47, because the evidence proffered was tentative and fragmentary. Justice Brennan dissented from the opinion of the Court specifically citing to Grigsby v. Mabry, supra. 78 L.Ed. 2d at 56, n. 7.

Although it is not respondent's place to challenge the non-final opinion rendered in Grigsby nor its obligation to defend the Arkansas Supreme Court's opinion issued in Rector v. State, ___ S.W.2d ___ (Ark.1983), Opinion filed October 17, 1983, 34 Cr.L. 2111, which counsel for the petitioner takes umbrage, a few words are in order.

The district court's conclusion in Grigsby is predicated upon the inference that because a person is capable of considering whether the death sentence is appropriate, he or she is thereby more likely to find a defendant is guilty of the crime charged than is a person who is unalterably opposed to the death penalty. This inference is derived from the opinions and conclusion of sociologists and scholars based upon so-called controlled studies. Even if the inference or implied bias is accurate, that does not answer the question of whether the accused received a constitutionally fair and impartial jury trial.

The Constitution only refers to an impartial jury and makes no further effort to quantify the degree of impartiality into such niches as prosecution-prone or defense-prone or gradations thereof. So long as the jurors upon voire dire are able to state under oath that they can accord the accused the presumption of innocence and will require the State to prove beyond a reasonable doubt the guilt of the defendant the constitutional right to an impartial jury has be preserved.

This very court has rightly rejected the dubious concept of implied bias--which Grigsby actually resorts to--concluding the opportunity to demonstrate actual bias by examination of the prospective jurors guarantees a defendant's right to an impartial jury. Smith v. Phillips, 455 U.S. 209 (1982). It is imperative to note that this petitioner does not allege much less demonstrate that any of the particular jurors who sat in his case were less than neutral with respect to his guilt!

This, respondent submits, must be done before he can validly claim that he was denied his constitutional right to a fair and impartial jury. Hutchinson v. Garrison, supra, Rehnquist, J., concurring; Smith v. Phillips, supra.

It should go without saying that petitioner does not want a constitutionally impartial jury, he wants a favorable one and he is not entitled to that. Spinkellink v. Wainwright, supra; Press-Enterprise Company v. Superior Court, ___ U.S. ___ (1983), Case No. 82-556, n. 9, Opinion filed January 18, 1984, 34 Cr.L. 3019,3021.

The "prosecution-prone" claim does not present a substantial federal question and therefore this Court should decline to grant discretionary review. Alternatively, if the Court determines the issue is properly before it, it should summarily affirm the judgment of guilt because the claim is frivolous and authoritatively resolved by the decisions of this Court.

Returning to the issue that was raised and disposed of by the Florida Supreme Court, to-wit: the excusal of Ruis and Young, 438 So.2d at 807-808, respondent suggests the disposition was clearly proper for each stated unequivocally that they were unable to consider imposing the death penalty under any circumstances. Witherspoon v. Illinois, supra; Spinkellink v. Wainwright, supra; and McCorquodale v. Balkcom, ___ F.2d ___, (11th Cir.1983), Case No. 82-8011, Opinion filed December 30, 1983, distinguishing Witt. Please remember all petitioner has told this Court is the excusal is "highly questionable" in light of Witt. It is, or should be, rather obvious that petitioner presupposes that Witt is a correct application of Witherspoon and its progeny and that it is factually similar. Respondent submits both suppositions are incorrect. This, however, is not the place to litigate the correctness of Witt for that will come in due course.

## QUESTION II

THE DECISION BELOW VACATING THE SENTENCE OF DEATH AND REMANDING FOR A NEW SENTENCING HEARING AND DETERMINATION IS NOT A FINAL JUDGMENT AND THIS COURT LACKS JURISDICTION UNDER 28 U.S.C. §1257(3) TO REVIEW SAID DECISION. IF JURISDICTION EXISTS, THE PETITION FAILS TO DEMONSTRATE A SUBSTANTIAL FEDERAL QUESTION RESPECTING THE VALIDITY OF §921.141, FLA.STAT., EITHER ON ITS FACE OR AS APPLIED.

## ARGUMENT

Petitioner attempts to present to this Court the constitutionality of Florida's death penalty statute on the grounds that it violates the double jeopardy clause and that the standard of review established in Tedder v. State, 322 So. 2d 908 (Fla.1975) is unconstitutionally vague and incapable of non-arbitrary application.

Initially, respondent suggests that these issues are not properly before this Court for the simple fact that the decision of the Supreme Court is not a final judgment since the cause was remanded for a new hearing, as was noted earlier. Hence, this Court has no jurisdiction.

Section 1257(3) of 28 U.S.C. limits the jurisdiction of this Court to review by certiorari only "[f]inal judgments or decrees rendered by the highest court of a state in which a decision could be had. . . ." Respondent respectfully suggests that the decision rendered by the Florida Supreme Court is not a "final judgment" within the meaning of 28 U.S.C., §1257, and that the petition filed herein should be dismissed. Whitus v. Georgia, 385 U.S. 545 (1967); Chapman v. California, 405 U.S. 1020 (1972).

The finality requirement which has been with us since the Judiciary Act of 1789 is "[d]esigned to avoid the evils of

piecemeal review" Republic Natural Gas Company v. Oklahoma, 334 U.S. 62 (1948), and is founded upon "considerations generally applicable to good judicial administration." Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 (1945). The decisions of this Court make it clear, however, that the concept of finality should be given a practical, as opposed to a technical, construction.

The fundamental question with respect as to when a judgment is "final" is whether it can be said that there is nothing more to be decided or that there has been an effective determination of the litigation. Richfield Oil Corporation v. State Board of Equalization, 329 U.S. 69 (1946). That is, for a judgment of a state appellate court to be final and reviewable, it must end the litigation by judicially determining the rights of the parties, so that nothing remains to be done by the trial judge except the ministerial act of entering the judgment which the appellate court has directed. Parker v. Illinois, 333 U.S. 571 (1948); Organization for Better Austin v. Keith, 402 U.S. 415 (1971) and Market St. Ry. Co. v. Railroad Commission of State of Cal., 324 U.S. 548 (1945). This Court has made it clear that a state court judgment, to be within the appellate jurisdiction of this Court, must be "final" in two senses. It must be subject to no further review or correction in any other state tribunal, and must be an effective determination of the litigation and not of mere interlocutory or intermediate steps therein.

In light of the foregoing it is clear the decision sought to be reviewed is not final. Upon remand if the trial judge imposes a life sentence, the issues raised herein become moot. On the other hand, if he reimposes a death sentence, then upon appeal therefrom the Florida Supreme Court will have to decide what it has not yet decided, to-wit: whether the imposition of such sentence over the recommendation of life comports with the Tedder standard. Quite obviously if the trial judge imposes death and the Supreme Court of Florida affirms that sentence, the petitioner would be entitled to seek review in this Court.

The simple fact remains, however, that there is considerable state court action required before the sentence can be regarded as final and the federal constitutional claim may not survive that state judicial labor. The judgment sought to be reviewed simply is not "final" and this Court should decline review at this time.

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Assuming this Court concludes the judgment is final, it should nevertheless deny review for the question presented insofar as it purports to raise a vagueness claim is improperly raised. Appellate counsel did not urge that Tedder created an unconstitutionally vague standard of review in a case such as this. In fact, petitioner's previous attorney embraced Tedder and argued that applying that test the trial judge erred in rejecting the jury's recommendation (Pet.App. 12-24). Oddly, in the petition for rehearing filed by present counsel there was no claim that Tedder established a constitutionally impermissible standard much less the scathing denunciation of the Florida Supreme Court's efforts to perform proportionate review of petitioner's sentence as contrasted with others similarly situated, although such review is not even constitutionally required. Pulley v. Harris, ___ U.S. ___ (1984), Case No. 82-1095, Opinion filed January 23, 1984. A constant premise throughout petitioner's analysis of the cases is that the purpose of placing the responsibility of sentencing in the hands of the trial judge was to protect the defendant by rejecting a death recommendation. (Pet. at 16,23-24). This premise illustrates that petitioner doesn't even understand the judicial function under the statutory scheme, which is to guard against unreasonable recommendations of either life or death, Dobbert v. Florida, 432 U.S. 282 (1977). The statute merely recognizes that jurys are capable of being arbitrary, either because of emotion or their general lack of familiarity

with the sentencing function. They certainly are not capable of reading decisions emanating from the Florida Supreme Court as is a trial judge who is then capable of making a legal assessment of the defendant's case. This is why the Court in Proffitt v. Florida, 428 U.S. 242,252 (1976) and in Pulley, supra, concluded Florida's statute would lead to "more consistent sentencing at the trial court level" 34 Cr.L. at 3030. In actuality, petitioner is asking this Court to engage in a proportionate review of his sentence and that is not the function of this Court, Pulley, or the federal courts. Spinkellink v. Wainwright, supra, at 604; Moore v. Balkcom,716 F.2d 1511, 1517-1519 (11th Cir.1983). Given the fact that the trial judge found four aggravating circumstances and no mitigating circumstances, which is not for this Court to re-examine or re-determine, it cannot be said that the imposition of a death sentence was arbitrary simply because a jury recommended life. If indeed there were no mitigating factors, there was nothing to weigh against the aggravating circumstances and the recommendation of life was unreasonable as a matter of law.

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Petitioner's double jeopardy claim is clearly unmeritorious. Dobbert v. Strickland, 718 F.2d 1518 (11th Cir.1983) and United States v. DiFransesco, 449 U.S. 117 (1980). The claim that the statute is unconstitutional because other states have elected to employ a binding recommendation for life is foreclosed by Proffitt itself.

## CONCLUSION

For the reasons stated hereinabove, this Court should decline to grant further review of this cause or it should summarily affirm the judgment of guilt entered against petitioner and found valid by the Florida Supreme Court.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response has been forwarded to Mr. Steven L. Bolotin, Assistant Public Defender, Post Office Box 671, Tallahassee, FL 32302, via U. S. Mail, this 2nd day of February 1984.

Raymond L. Marky
Raymond L. Marky
Assistant Attorney General

ORIGINAL



NO. 83-6043

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983





GREGORY SCOTT ENGLE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

---

REPLY BRIEF ON

PETITION FOR WRIT OF CERTIORARI TO

THE SUPREME COURT OF FLORIDA

---

MICHAEL E. ALLEN
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SECOND JUDICIAL CIRCUIT

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## QUESTION PRESENTED

| QUESTION | PAGE(S) |
|---|---|
| TO THE EXTENT THAT IT AUTHORIZES THE TRIAL JUDGE TO OVERRIDE A JURY'S RECOMMENDATION OF LIFE IMPRISONMENT AND IMPOSE A DEATH SENTENCE IN ITS STEAD, FLORIDA'S DEATH PENALTY STATUTE VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND THE GUARANTEE AGAINST CRUEL AND UNUSUAL PUNISHMENT CONTAINED IN THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION. | 1 |

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## REASONS FOR GRANTING WRIT

### QUESTION II

TO THE EXTENT THAT IT AUTHORIZES THE TRIAL JUDGE TO OVERRIDE A JURY'S RECOMMENDATION OF LIFE IMPRISONMENT AND IMPOSE A DEATH SENTENCE IN ITS STEAD, FLORIDA'S DEATH PENALTY STATUTE VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND THE GUARANTEE AGAINST CRUEL AND UNUSUAL PUNISHMENT CONTAINED IN THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The state, at page 1 of its response, says "The Supreme Court of Florida did not reach the issue of whether the judicial rejection of the jury recommendation satisfied the requirements of Tedder v. State, 322 So.2d 908 (Fla. 1975)," and contends that that Court "never even intimated whether the rejection of the jury recommendation could or would be sustained under Tedder . . . ." While petitioner certainly would agree that the Florida Supreme Court need not have ruled on the validity of the trial court's override of the jury's life recommendation, the fact remains that it chose to do so. The opinion reads, in part:

> Appellant's sixth point on appeal is that the trial court erred by rejecting the jury's recommendation of life imprisonment and instead imposing the death penalty. We note at the outset the error of appellant's contention that a sentence of death imposed by a trial court after a jury recommendation of life imprisonment constitutes double jeopardy. We held to the contrary in Douglas v. State, 373 So.2d 895 (Fla. 1979). See also Phippen v. State, 389 So.2d 991 (Fla. 1980).
>
> As to the propriety of the judge's failure to follow the jury's sentence recommendation, "[i]n order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So.2d 908, 910 (Fla. 1975). The trial judge found four aggravating circumstances, to wit: that the murder was committed after appellant had engaged in a kidnapping and rape, that it was committed to avoid a lawful arrest, that it was committed for pecuniary gain, and that it was especially heinous, atrocious, and cruel. He found no mitigating circumstances. Review of the record demonstrates the validity and propriety of the above findings.
>
> Engle v. State, 438 So.2d 803,812 (Fla. 1983)

On the merits of petitioner's argument that Florida's

statutory procedure authorizing the trial judge to impose a death sentence notwithstanding the jury's life recommendation is unconstitutional as applied, the state blithely responds that that the issue is foreclosed by Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). Petitioner relies on the arguments made in his petition for certiorari to show why this is not so; in addition, petitioner would note that on January 9, 1984, this Court granted certiorari in Spaziano v. Florida, __ U.S. __ (1984)(Case No. 83-5596)(34 Cr.L. 4159). Three questions are presented in Spaziano; two of these are whether the Florida Supreme Court, in affirming death sentences, has adopted such broad and vague application of standards governing the decision to override a jury's life verdict as to violate the Fifth, Sixth, Eighth, and Fourteenth Amendments; and whether the trial judge's override of a jury's factually based decision against imposition of the death penalty violates, in all cases, the Fifth, Sixth, and Fourteenth Amendments. Accordingly, in view of the similarity of the issues in Spaziano and the instant case, petitioner respectfully requests that this Court accept this case for review in conjunction with Spaziano, or, in the alternative, to stay its disposition of this petition for certiorari until Spaziano has been decided.

Finally, petitioner would note that in the past two weeks the Florida Supreme Court has affirmed two more death sentences which were imposed notwithstanding jury life recommendations. Lusk v. State, __ So.2d __ (Fla. 1984)(Case No. 59,146, opinion filed January 26, 1984); Heiney v. State, __ So.2d __ (Fla. 1984)(Case No. 56,778, opinion filed February 2, 1984). This brings the total to 21 death sentences which have been affirmed by the Florida Supreme Court following the trial court's override of the jury's life recommendation.

## CONCLUSION

WHEREFORE, the petition for writ of certiorari should be granted.

Respectfully submitted,

MICHAEL E. ALLEN
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SECOND JUDICIAL CIRCUIT

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to the Honorable Alexander L. Stevas, Clerk of the Supreme Court of the United States, First and Maryland Avenue, N.E., Washington, DC 20543; Gregory Scott Engle, #069240, Florida State Prison, Post Office Box 747, Starke, Florida 32091; and copies furnished by hand delivery to the Honorable Sid White, Clerk of the Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32301 and to Raymond L. Marky, Assistant Attorney General, The Capitol, Tallahassee, Florida 32301 on this 7 day of February, 1984.

Steven L Bolotin
STEVEN L. BOLOTIN